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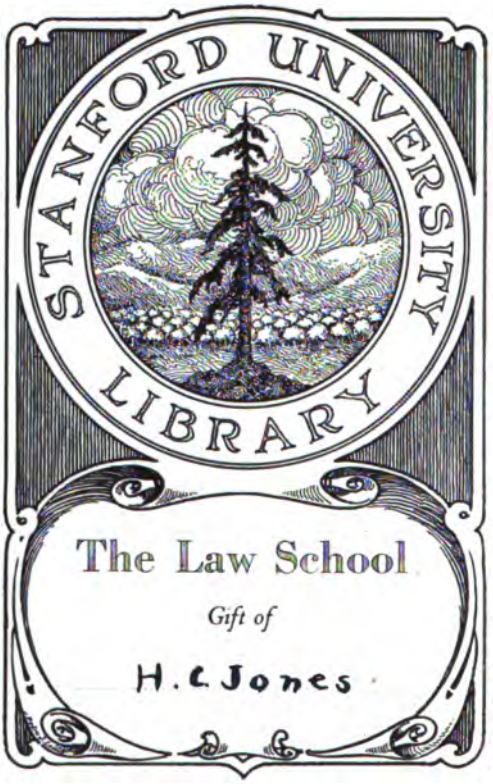
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THE

AMERICAN PROBATE REPORTS:

CONTAINING

RECENT CASES OF GENERAL VALUE DECIDED IN THE COURTS OF THE SEVERAL STATES ON POINTS OF PROBATE LAW.

WITH NOTES AND REFERENCES.

BY

CHARLES FISK BEACH, JR.,
OF THE NEW YORK BAR,
AUTHOR OF "A MANUAL OF THE LAW OF WILLS."

VOL. VII.

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FARGO *vs.* MILLER.

(150 Massachusetts, 225.)

NEXT OF KIN.—TIME OF DETERMINING.

A gift over to next of kin and to certain other legatees after termination of a particular estate, *held* to refer to those who should be next of kin at the termination of the particular estate.

APPEAL from a judgment of the Supreme Judicial Court of Hampshire County.

A. J. Fargo, pro se, read the papers in the case.

E. P. Kendrick, for the testatrix's brother and sister, and her husband's nephew and nieces.

C. H. Van Alstine (of Wisconsin), for Nathaniel W. Miller.

J. C. Hammond, for the husband's grand-nephews and grand-nieces.

P. Fuller (of New York), for Frederick A. Miller.

FIELD, J. The will of Mrs. Wells was written by herself, and is dated June 2, 1886. She died, without issue, April 4, 1887. Her father, two brothers, one sister, and one nephew, son of a deceased brother, survived her. She was a widow, her husband having died February 8, 1872. There is no mention of her mother,

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but it is evident that she had died before the will was made. The age of the testatrix does not appear from the papers, but there is no doubt that she did not contemplate the possibility of marrying again, and of having children. The nearest blood relations of her husband, living at the time of her death, were one nephew and seven nieces, and the children of a niece who had died. The will puts all her property in trust for her father, if he should survive her, with directions to the trustees to give him the use of it, "or as much of it as he shall need for his comfortable support," during his life, "provided he remains unmarried and shall himself pay towards the support" of himself one thousand dollars annually. The will also provides that "in case the income from my estate, added to the one thousand dollars which shall be paid by my father, said Alvah, should, by losses, changes, or any loss, be insufficient for his comfortable maintenance, I will and direct the whole estate, both real and personal, shall be freely but judiciously used for his ease, benefit, and comfort." The will also directs the trustees to pay to her father, "for his sole and separate use, as long as he shall live, an annuity of one hundred dollars, payable quarterly." With reference to the future marriage of her father, the provision is as follows: "Shall [should] such a thing occur as his marriage at his advanced age, which, though possible, is still very improbable, I direct my trustees at once to proceed with the distribution of my estate in the same manner as if my father were deceased." The will further provides, that, "at the decease or marriage of my father, said Alvah, Senior, I direct my said trustees to pay" to various persons named various sums of money, in all amounting to about $14,000, and "to set apart and create" five separate trust funds, in all amounting to $10,000. The persons to whom legacies in money are thus given include the children of the deceased niece of her husband, and her nephew, the son of her deceased brother; and the persons to whom the income of these trust funds is given for life include her brother, Alvah Miller, Jr., and her

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sister. The income of the trust fund for her sister is to be "judiciously applied for her comfort in her invalid condition so long as she shall live," ..." and upon her decease the trust so created shall cease, and the said fund shall be paid over and transferred to my next of kin, for their own benefit, and subject to their own control, share and share alike." The remaining trust for persons are, in effect, that the net annual income shall in each case be paid and applied "to the use and benefit" of the beneficiary so long as he or she shall live, and upon his or her decease "the trusts so created shall cease, and the said fund shall be paid over and form a part of my estate, to be hereinafter disposed of." The residuary clause was as follows: "Subject to the provisions hereinbefore made by way of legacies, and to the creation of the trust hereinbefore specified, all of which are to be ratably diminished in case, by any unforeseen occurrence, my estate should be so diminished as not to amount to the aggregate hereinbefore disposed of, I give, devise, and bequeath all the rest, residue, and remainder of my entire estate, both real and personal, unto the next of kin of my dear husband, the late John H. Wells, and to my next of kin, in the proportion of two-thirds of the amount to my next of kin, and one-third to the next of kin of my late husband, the said John H., the larger part to my next of kin, as from my family and kin my estate has been in this proportion enlarged." The father of the testatrix, Alvah Miller, Sr. died March 24, 1888, never having married again, leaving a will in which he gave all the residue of his estate to his two sons, Augustus Miller and Alvah Miller, Jr. Augustus Miller died December 28, 1888, leaving a son, Nathaniel W. Miller, one of the defendants. The executors of Mrs. Wells have paid all debts and legacies, have set apart the amounts directed for the trust funds, and have settled their accounts in the probate court; and there remains in their hands for distribution a balance of $4,000. There is also valuable real estate.

The principal question is whether the next of kin of

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the testatrix, and of her deceased husband, who take under the residuary clause, are those persons who were living and next of kin at the time of her death, or those who were such at the time of the death of her father. If her next of kin are determined as of the time of her death, her father would be her sole next of kin, and he would have been the sole distributee and sole heir of her estate, if she had died intestate. It is manifest, we think, that the testatrix never intended that he should receive absolutely any of her property, beyond that given to him for his life, and that she intended that, if he married, he should cease thereafter to receive any benefit from her estate. The legacies were to be paid, and the five trust funds were to be created and set apart, at the decease or marriage of the father. The first trust so to be created was to continue during the life of the sister of the testatrix; and upon her decease the fund was to be paid over to the next of kin of the testatrix, share and share alike. This contemplates that there might be more than one next of kin, and that they should take equal shares.

It is possible that the testatrix did not know the provisions of our statutes concerning the descent of real, or the distribution of personal, property; but it cannot be presumed that she did not know who her nearest kindred were. It is also possible that she did not know the distinction between vested and contingent remainders, or between rights of property and rights of possession and enjoyment, and that, having written down all the specific provisions she wished to make, she used general phrases in the residuary clause, without considering what they meant, or might mean in the various contingencies which might happen. The primary rule is that a will is to be construed according to the intention of the testator, as expressed in it, if that intention can be ascertained with reasonable certainty. Whatever force may be given to artificial rules of construction, it is certainly an objection of some weight against any particular construction that it leads to a result which the testator could not have intended. In

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Abbott v. *Bradstreet* (3 Allen, 587, 589), it is said in the opinion that "the rule is well settled, as a general rule of construction, that a bequest or devise to 'heirs' or 'heirs at law' of a testator will be construed as referring to those who are such at the time of the testator's decease, unless a different intent is plainly manifested by the will;" that "where such an intent is plainly manifested, it will, of course, prevail;" and that "this rule is a consequence of the preference which the law gives to vested over contingent remainders." The rule is undoubtedly the same when the devise or bequest is to the next of kin of the testator as when it is to the heirs of the testator. The cases on this subject are collected in the opinion in *Abbott* v. *Bradstreet*, and subsequent decisions have emphasized the rule there stated. (*Minot* v. *Tappan*, 122 Mass. 535, 536; *Dove* v. *Torr*, 128 Mass. 38; *Minot* v. *Harris*, 132 Mass. 528; *Whall* v. *Converse*, 146 Mass. 345.) In *Abbott* v. *Bradstreet*, it is also said that "it has been held in some cases that if there is a gift to a person for life, with remainder to the testator's next of kin, and the person taking the life-estate is the sole next of kin at the death of the testator, the remainder will be considered as given to the persons answering the description at the termination of the estate for life," and that this class of cases as well as another in which the first legatee is only one of the next of kin, "are generally recognized as exceptional, and the construction adopted is usually strengthened by some special circumstances indicative of intention." In *Minot* v. *Tappan* it is said that the fact that the life-tenant is one of the heirs at law of the testator at the time of his decease "does not take the case out of the general rule." See *Bullock* v. *Downes*, (9 H. L. Cas. 1.); *Mortimore* v. *Mortimore* (L. R. 4 App. Cas. 448); *Elmsley* v. *Young* (2 Mylne & K. 82, 780). Whether, if the life-tenant were the sole next of kin or heir of the testator when the will was made, and would continue to be such if he survive the testator, and this were known to the testator, this fact alone would be sufficient to show that the testator did not in-

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tend to include him in a gift of the remainder to the heirs or next of kin of the testator cannot be considered as free from doubt. See *Lees* v. *Massey* (3 De Gex, F. & J. 113; 2 Jarm. Wills, 5th Ed. 132,141); *Cusack* v. *Rood* (24 Wkly. Rep. 391).

In the present case the distribution of the whole estate was, by the terms of the will, to be postponed till the death or marriage of the father. There is no reference in the will to the statutes of distribution. Such a reference has sometimes been regarded as a circumstance indicating that the testator intended that his next of kin should take as of the time of his death, because the persons who are distributees under the statute take from that time. The legacy to the father would, of course, be of no effect, if he died before the testatrix; but, if he survived her, she intended that he should not marry and retain any benefit from her will. She contemplated the possibility that the whole of her estate might be consumed in taking care of her father, and that the legacies to others might never be paid, or the special trust funds set apart. The reason which she gives for dividing the residuum of her estate between the next of kin of her husband and those of herself in the proportion of two-thirds and one-third is that "from my family and kin my estate has been in this proportion enlarged." This does not show that she contemplated that, if her father survived her, he, or only those claiming under him, should take the one-third. We think that there are significant indications in the will that the testatrix did not intend that her father should take any part of the residue as her next of kin, and that she did intend that the residue should be distributed as of the time of his death or marriage, and that the next of kin should be ascertained as of that time, besides the fact that the use of the whole estate, and, if necessary, portions of the principal, had been given to him for life, or until he married; and, in our opinion, the will should receive this construction. See *Knowlton* v. *Sanderson* (141 Mass. 323). As the next of kin of the testatrix must be ascertained as of the death

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of her father, the next of kin of her husband must be ascertained as of the same time. In determining the meaning of the words "next of kin," we see nothing in the will by which this case can be distinguished from *Swasey* v. *Jaques* (144 Mass. 135). Those persons who were living, and were the nearest blood relations of her husband and of herself at the time of the death of her father, or their legal representatives if they have since deceased, are entitled to the residue in the proportion declared in the will. The details of the decree must be settled by a single justice.

So ordered.

That relations by marriage are not included in "next of kin," see, Wetter v. Walker, 1 Am. Prob. Rep. 519.

MCDONALD *vs.* WHITE.

(130 Illinois, 493.)

CONTEST OF WILL.—RIGHT TO CONTEST NOT ASSIGNABLE.

The grantee of a contingent remainderman whose estate depended upon the life tenant dying intestate, acquires no right to contest the life tenant's will.

APPEAL from a decree of the Circuit Court of Sangamon County. The opinion discloses the facts.

Conkling & Grout, for appellants.

Patton & Hamilton, for appellees.

SCHOFIELD, J. This was a bill in chancery, filed in the Circuit Court of Sangamon County, to contest the validity of the will of Catherine McDonald, deceased. Its allegations are substantially as follows: "Your orators, Thomas F. McDonald, and William Kane, respect-

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fully represent unto your honor that one John McDonald, late of said county, departed this life on or about the 1st day of December, 1877, testate; that said John McDonald left Catherine McDonald, his widow, and James H. McDonald, Margaret McDonald, now Margaret Stubblefield, Patrick McDonald, Andrew McDonald, and your orator Thomas McDonald, his children, as his only heirs at law; that by his will, which said will was duly probated in the County Court of Sangamon County, Ill., said John McDonald bequeathed to his wife, Catherine McDonald, all his real estate of which he died seized, to have and to hold the same for and during her natural life, giving her the rents and profits arising therefrom, and with power to dispose of said real estate by her last will and testament as she should deem proper, but not the power of sale;that among other things it was in said will provided that, in case his wife should fail, neglect, or refuse to make a will or testament, he then made this disposition of his estate: To James McDonald, his son, he willed and bequeathed lot 5 of block 3 of J. W. Crosby's addition to the city of Springfield, Sangamon County, and State of Illinois. Your orators further represent that on the 16th day of September, 1885, said Catherine McDonald departed this life, leaving what was claimed to be her last will and testament, which said pretended last will and testament was on the 22nd day of September, 1885, admitted to probate by the County Court of Sangamon County, Ill.; that by said pretended will of Catherine McDonald she gave and bequeathed to Mary White, of Springfield, the said lot 5, in block 3, in Crosby's second addition to the city of Springfield, and all right and interest that she may have in said land. But your orators represent and charge the fact to be that, at the time of the making of the said pretended will, said Catherine McDonald was not of sound mind and memory, or capable of making a will; that on the 21st day of January, 1884, in the County Court of Sangamon County, State of Illinois, said Catherine McDonald was, by jury, found to be a distracted person, and a conservator

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was appointed for her on the 22nd day of January, 1884; that, after said Catherine McDonald became a distracted person, the pretended will was claimed to have been executed, but your orators allege and state the facts to be that at the time said pretended will was made she was not of sound mind or memory, or capable of making a will; that the will was not executed by her in the presence of two witnesses, as required by law; that the witnesses did not attest said pretended will in her presence, nor did she declare it to be her last will and testament. Your orators further aver that, the pretended will not being valid, the property before described under the will of John McDonald became, on the death of Catherine McDonald, the property of said James McDonald, son of John McDonald; that James McDonald on the 7th day of May, 1887, conveyed to your orator Thomas F. McDonald all his interest in lot 5, block 3, Crosby's second addition to the city of Springfield, Ill., and that said Thomas F. McDonald conveyed to William Kane his interest in said real estate, but that said Thomas F. McDonald yet has a half interest in said estate, although it stands in the name of William Kane upon the records. Your orators further represent that said Mary White is in possession of said premises, claiming them under the pretended will of Catherine McDonald. Your orators further represent that no parties, except your orators and the said Mary White, whose husband is George M. White, have any interest in said will, or in said real estate; and that your orators are the persons interested in said will, and have the right, under the statute of the State of Illinois, at any time within three years after the probate of such will, to appear by their bill in chancery, and contest the validity of the same, and have an issue at law made up, whether the writing purporting to be the will of Catherine McDonald is her will or not. Your orators further represent that George M. White was appointed administrator of Catherine McDonald by the County Court of Sangamon County, with the will annexed, on the 25th day of September, 1885. Represent

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that Patrick McDonald, one of the children of John McDonald, has since died, and left as his children and heirs at law Annie McDonald and Katie A. McDonald. Forasmuch, therefore, as your orators are without remedy in the premises except in a court of equity, and to the end that the said Mary White, George M. White, and George M. White, administrator with the will annexed of Catherine McDonald, deceased, who are made parties defendant to this bill, may be required to make full and direct answer to the same, but not under oath, the answer under oath being hereby waived, and to the end that the said instrument in writing and the probate thereof may be set aside and declared null and void as not the last will and testament of the said Catherine McDonald, and that the said real estate before described may be freed from the operation of said pretended will, and that said pretended will may be set aside as a cloud upon the title; that your orators may have such other and further relief in the premises as equity may require, and to your honor seem meet. May it please your honor to grant the writ of summons in chancery, directed to the sheriff of Sangamon County, commanding him to summon the said Mary White, George M. White, and George M. White, administrator with the will annexed of Catherine McDonald, deceased, to be and appear before this court, on the 1st day of the next September term thereof, to be held at the court house in said county, then and there to answer this bill." The defendants demurred to the bill, and for cause of demurrer alleged that the complainants have not now, nor did they have at the time of the filing of said bill, any interest in the last will and testament of the said Catherine McDonald. The court sustained the demurrer, and the cause is hereby the appeal of the complainants.

Since it is alleged in the bill that Mary White is in possession of the premises claiming under the will, the bill cannot be sustained as a mere bill to remove a cloud from the title, *Hardin* v. *Jones* (86 Ill. 313); *Gage* v. *Abbott* (99 Ill. 366); *Gage* v. *Griffin* (103 Ill. 41); *Gage* v.

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Schmidt (104 Ill. 106); and therefore it only remains to determine whether the bill can be sustained as a bill to contest a will under section 7, c. 148, Rev. St. 1874, entitled "Wills." We think it very clear that it cannot, and that the demurrer to the bill was properly sustained by the court below. It is provided in that section that "when any will, testament, or codicil shall be exhibited in the County Court for probate * * * it shall be the duty of the court to receive probate of the same without delay, and to grant letters, * * * and to do all other needful acts to enable the parties concerned to make settlement of the estate at as early a day as shall be consistent with the rights of the respective persons interested therein: provided, however, that if any person interested shall within three years after the probate of any such will * * * appear, and by his or her bill in chancery," etc., then an issue shall be made whether the writing produced is the will of the testator or testatrix. The section also provides that; "but if no such person shall appear within the time aforesaid, the probate, as aforesaid, shall be forever binding and conclusive on all parties concerned."

Manifestly, the words "parties concerned" mean those upon whom the law imposes the duty of settling the estate, and the words "interested therein" mean those interested in the settlement of the estate,—that is, those who will be directly affected in a pecuniary sense by its settlement,—and the words "any person interested" can only mean one of the same class of persons. The interest must be a direct pecuniary interest effected by the probate of the will, for the reference is to an existing interest, and not to an interest which may be subsequently acquired, since in that event the language would have been, "or if any one who shall, within three years, be interested and appear, and by his or her bill in chancery," etc., That this is the correct meaning of the words is further manifest by reference to section 14 of the same chapter, where it is provided that "appeals may be taken from the order of the County Court, allowing or disallowing any will

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to probate, to the Circuit Court of the same county, by any person interested in such will, in the same time and manner as appeals may be taken from justices of the peace," etc. It is impossible, in the very nature of things, that others than parties interested in the will at the time of probate can here be intended, and yet precisely the same reasons exist why the legislature should restrict the right of contest under section 7 as the right of appeal under section 14. Appellants were not interested in the probate of this will. They were deprived of nothing by it. Their interest was derived by purchase long subsequent to the probate of the will, and is therefore not such as is within the contemplation of the statute.

Moreover, James M. McDonald never had possession of this property. He never had any apparent title to it. At most all that he had was the bare right to establish title by successfully contesting this will. But such a right is not assignable, and cannot, therefore, be the subject of a conveyance. (*Norton* v. *Tuttle* 60 Ill. 130).

The decree is affirmed.

AVELING *v.* NORTHWESTERN MASONIC AID ASSOCIATION.

(72 Michigan, 7.)

GENERAL RESIDUARY BEQUEST.—LIFE INSURANCE POLICY.

A general bequest of "all other property of which I shall die seized," passes the benefit of a life insurance policy payable "to the devisees, or, if no will, to the heirs."

APPEAL from a judgment of the Circuit Court of Wayne County.

E. H. Flinn and *W. I. Culver*, (*Edwin F. Conley*, of counsel), for appellant.

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Oscar M. Springer, (*Henry A. Chaney*, of counsel,) for appellee.

MORSE, J. The defendant is a corporation organized and existing under the laws of the State of Illinois. March 5, 1885, it issued to Robert Aveling a certificate of insurance, in which it agreed to pay the sum of $2,500 upon his death "to his devisees, or, if no will, to the heirs at law of said Robert Aveling." Robert Aveling died on the 21st day of February, 1887, leaving the following last will and testament:

"I, Robert Aveling, of the township of Springwells, County of Wayne, State of Michigan, being in good health and sound mind and memory, do make this my last will and testament: I will, devise, and bequeath all those certain lots, known as lots 115, 116, 117, and 118 of J. W. Johnson's subdiv. of the east half of private claim 78, in the township of Springwells joining the city of Detroit, north of the Chicago road, so called; also the undivided one-half of lot 124, same subdivision, with all the appurtenances thereon. I also devise and bequeath all other property of which I shall die seized, real, personal, and mixed, especially all money in Detroit Savings Bank and Wayne County Savings Bank, Detroit, Mich.: all bonds and notes and stocks to Richard Aveling of the city of Detroit, County of Wayne, State of Michigan, to him, his heirs and assigns forever. Witness my hand and seal at * * * aforesaid.

[Signed] "ROBERT AVELING." [Seal.]

"Signed, sealed, and declared to be the last will and testament of the testator, in our presence and in the presence of each other, who at his request have signed our names as witnesses, this * * *

[Signed] "JOHN THOMAS,

"ARTHUR GARD."

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This will was admitted to probate in Wayne County, May 10, 1887, and on the same day his brother, the plaintiff, was duly appointed administrator of his estate, with the will annexed. He demanded of the defendant payment to himself of the entire sum due on the certificate. Payment being refused, he brought this suit. He recovered in the court below. The suit is defended by the defendant on the sole ground "that the certificate of insurance does not make the right to the insurance depend upon the accident of being named in the will as devisee of something else, but that it confers upon the insured a power of appointment under or by virtue of which he may designate in his will the devisee or devisees of his insurance. In case the insured fails to exercise this power of appointment, the insurance passes directly to his heirs at law." It was shown upon the trial that the deceased left surviving him one sister and the children of a deceased sister.

It will be seen by the will that the plaintiff is the sole devisee of all the property of the decedent. But it is argued that, although he is the sole and general devisee, the testator in his will specifically named most of the property, if not all, of it bequeathed to plaintiff, and made no mention of the insurance, thereby showing no intent to will it to him, as the words "shall die seized" would not include the insurance, as he did not die seized of it; that such insurance would not pass to his administrator, nor would it be included in a general devise of his estate, as it constituted no part of his estate at the time of his death. While, technically speaking, the decedent may not have died seized of this insurance, we are satisfied that he intended to pass his insurance, as well as all of his other property, to the plaintiff.

The circuit judge was right, and the judgment will be affirmed, with costs.

The other Justices concurred.

See Holland v. Taylor, 6 Am. Prob.. Rep. 536 and note.

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WATSON *vs.* TURNER.

(89 Alabama, 220.)

CONTEST.—LIMITATION.—REPUGNANT CODICIL.—REVOCATION OF PROBATE.

A repugnant codicil cannot be proven after the expiration of the time within which the validity of a will can be contested.
A codicil is a "will" within the meaning of the Alabama statute (Ala. Code of 1886. § 2,000), relating to the contest of wills.

APPEAL from a decree of the Chancery Court of Talladega County. The facts appear in the opinion.

Cecil Browne, for appellant.

Knox & Bowie, for appellee.

SOMERVILLE, J. The will of Joseph McReynolds, who died in September, 1864, was probated in the Probate Court of Talladega County on January 6, 1865. An instrument purporting to be a codicil of the same will was recently presented to the same court to be proved, and this paper was also probated in due form on December 6, 1886, more than 20 years, it will be observed, after the probate of the will itself. Some of the interested parties contested the proceeding, but the appellant was not one of these contestants. The present bill is filed by the appellant for the purpose of contesting the validity of this codicil, which, in some of its provisions, makes dispositions of the testator's property essentially different from those made in the will as originally admitted to probate. The jurisdiction invoked is claimed under the following statute: "Any person interested in any will, who has not contested the same under the provisions of this article (Code 1886, § 1989 *et seq.*), may, at any time within five years after the admission of such will to probate in this state, contest the validity of the same by bill in chancery in the district in which such will was probated, or in the district in which a material defendant resides."

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(Code 1886, § 2000.) It is further declared (section 2002) that "after the expiration of such five years the validity of the will can only be contested by infants and persons of unsound mind, who are allowed five years from the termination of their respective disabilities; but in no case to exceed twenty years from the probate." This statute has existed in this state since the year 1806, having undergone a change in phraseology, but not in meaning, in passing through our various Codes enacted since that time. (Aiken's Dig. 450.) Its effect was to confer on courts of equity a jurisdiction which they never before possessed,—the power to set aside a probated will for fraud, forgery, or other ground affecting the validity of the paper. Another purpose was to shorten the time within which a judgment establishing a will could be disturbed, or the validity of the will, as such, assailed; or, as said in *Johnston* v. *Glasscock* (2 Ala. 218, 235), where the statute of 1806 was construed, "to provide a period of limitation much shorter than before was known after which the will admitted to probate ceases to be the subject of controversy, and becomes entirely conclusive on parties interested." Prior to this statute there can be no doubt of the fact that the inherent jurisdiction of probate courts in this country, as of ecclesiastical courts formerly in England, embraced the power to set aside the probate of a will at any time upon the discovery of a posterior will of the testator, and upon proper proof of its execution by the testator. (*Gaines* v. *Hennen*, 24 How. U. S. 553.) The rule is commonly asserted to be that the probate of a will either in common or solemn form may be revoked on evidence of fraud in the proof or of a later will. (1 Williams' Ex'rs, 399, 508.) Codicils which may have been overlooked are placed upon the same footing as later wills.

A leading case on this subject is *Waters* v. *Stickney* (12 Allen, 1; Am. Decis. 90, 122), where many authorities, American and English, are ably reviewed by Mr. Justice GRAY. After announcing the general rule that the decrees of probate courts as to matters of probate,

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and within the authority conferred on them by law, are conclusive in courts of common law, and cannot be set aside by courts of equity, he asserts that such decrees may be revoked for fraud, mistake, or other good cause by the court which granted them. "In the face of the authorities," he says, "it is impossible to deny the power of a court of probate to approve a subsequent will or codicil after admitting to probate an earlier will by a decree the time of appealing from which is past, or to correct errors arising out of fraud or mistake in its own decrees." The decree of the Probate Court, which had admitted the codicil of a will to probate 14 years after a former decree probating the will itself, was affirmed as free from error. Cases are reported where later wills and codicils have been admitted to probate more than 20, and even as late as 30, years after the death of the testator. (*Shumway* v. *Holbrook*, 11 Amer. Dec. 153; *Rebhan* v. *Mueller*, 2 N. E. Rep. 75; 55 Amer. Rep. 869; *Haddock* v. *B & M. Railroad Co.*, 146 Mass. 155; 6 Am. Prob. Rep. 42). This statute was construed in *Hardy* v. *Hardy* (26 Ala. 524). The decision reached in that case, and the reasoning of the court, establish the following propositions: (1) That the jurisdiction conferred by the act of 1806 (Clay, Dig. p. 598, § 15) on courts of chancery to entertain bills of this nature contesting the validity of wills already proved in courts of probate was exclusive; (2) that a court of probate therefore no longer possessed its ancient jurisdiction to set aside the probate of a former will and permit the probate of a later one; (3) that the lapse of five years is a bar to any contest in either forum. The reasoning of the court was that the proof of a later will inconsistent with a former one already proved, impeached the validity of the latter, and, "if admitted to probate, the consequence would be that there would be two wills established, inconsistent in their provisions." "It was to avoid such consequences," said GOLDTHWAITE, J., "that the statute to which we have referred was enacted. The paper offered for probate impeaches in part the will already ad-

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mitted to probate, and this, as we have seen, can only be done in the mode and within the time prescribed by the act." To establish a later will is necessarily to disestablish a former one already proved. The same is obviously true of a codicil, any of the provisions of which are inconsistent with those of the will itself. To prove a codicil is *pro tanto* to disprove so much of the probated will as it may revoke or modify. The distinction is one of extent, not of kind or quality. The attempt to set aside a probated will, therefore, by proving a later one, or by attaching to it a codicil with inconsistent provisions, is a contest of the validity of the former will. In point of reason we can see no valid distinction in the two cases. The evil results flowing from each are the same,—a like violation of the repose of titles, and a like uncertainty as to the conclusiveness of judicial determinations. The only authority precisely in point which we discover on the question is found in Mr. Freeman's note to *Waters* v. *Stickney* (90 Amer. Dec. 137), cited *supra*. He says: "Offering a codicil after the probate of a former will is said to be, in effect, an offer for probate of a later will; and where (as by statute in some states) the validity and *status* of a will cannot be contested after a certain period it is held that the offer for probate of a codicil amounts to a contest of the will or probate, and must be made within the prescribed time. He cites in support of this assertion the case of Adsit's Estate (Myrick Cal. Prob. 266). We do not doubt the correctness of this conclusion as announcing the safer and better view of the law.

The contest sought to be inaugurated by the present bill has in view the judgment of the Probate Court which established the codicil in December, 1886. The bill was filed in October, 1888, being fully within the statutory limits of five years. That this codicil was a will within the meaning of the statute (Code 1886, § 2000), such as may be contested in the mode prescribed, there can be no sort of doubt. This fact is in no wise affected by the further consideration that the

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attempt to establish it in the Probate Court was itself a contest of a prior will to the provisions of which the codicil was partly repugnant. And there is, in our opinion, quite as little doubt that the complainant brings herself within the terms of the statute, as not only being interested in the will, but as one who had not contested the validity of the paper upon its presentation to the Probate Court for establishment as she might lawfully have done under the provisions of section 1989 of the Code (1886). It may be true, as contended, that a decree rendered by the Chancery Court, upon a bill of this kind being filed, either establishing or annulling the probate of the will, would be final and conclusive as to the validity of the will in all courts and upon all persons until set aside or reversed in some direct proceeding. It was so decided in *Hunt* v. *Acre* (28 Ala. 580). But no other interested person is here shown to have assailed the probate of this codicil in a chancery proceeding, and hence that principle can have no application here.

The question under discussion is raised by the fourth assignment of error, and that assignment is based on the action of the Chancellor in refusing to sustain the sixth ground of contest. The substance of the objection is that the Probate Court had permitted the probate of a codicil to a will which had itself been duly probated more than 20 years before the presentation of the codicil. The Chancellor erred in not sustaining this objection, which sufficiently appears from the pleadings in the case and the admitted facts contained in the agreement of counsel, irrespective of the testimony omitted from the record. The decree will be reversed, and a decree will be rendered in this court sustaining the sixth ground of objection to the validity of the codicil probated on December 6, 1886, and adjudging that said judgment be declared null and of no effect. The appellee will be taxed with the cost of this appeal, and the costs in the court below will be equally divided between the appellants and appellees.

Reversed and remanded.

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Revocation of Probate.—"Decrees of probate courts in matters of probate, within the authority conferred upon them by law, are conclusive upon the courts of common law, and cannot be reversed by writ of error or *certiorari*." Waters v. Stickney, 12 Allen, 1, 3, citing Dublin v. Chadbourn, 16 Mass. 441; Smith v. Rice, 11 Mass. 513; Peters v. Peters, 8 Cush. 529. "Nor can they be set aside in equity, even for fraud." Waters v. Stickney, 12 Allen, 1, 3, citing Kerrich v. Bransby, 7 Bro. P. C. (2nd ed.) 437; s. c. *sub nom*, Herridge v. Bransby, 2 Lee, 563; Barnesly v. Powell, 1Ves. Sr. 287; Allen v. Macpherson, 1 Phillips, 145,146; s. c. 1 H. L. Cas. 211, 220, 221, 225, 231, 234; Gaines v. Chew, 2 How. 641, 645, 646; Sever v. Russell, 4 Cush. 513. "But the very authorities cited for the appellant to show the conclusiveness of an existing probate, state that it may be repealed by the court which granted it." Waters v. Stickney, 12 Allen, 1. 4, citing Noell v. Wells, 1 Lev. 231; s. c. 1 Sid. 359; Allen v. Dundas, 3 Term. Rep. 125; 2 Smiths L. Cas. (5th ed.) 466.

In Barnesly v. Powell, 1 Ves. Sr. 254, a will of personalty which had been proved in the ecclesiastical court (evidently in solemn form, for it is said in the report that the time for appeal had lapsed, whereas if it had been proved in common form only, the party could have had relief by citing in the executor, without being put to his appeal), was shown to have been forged; and Lord Hardwicke decreed that the party should consent to a revocation of the probate and letters testamentary, so as to enable the ecclesiastical court to cause them "to be duly revoked according to the course of that court." s. c. Belt's Suppt. 150. The custom and right of that court to revoke any of its decrees obtained by fraud or surprise are also recognized in Harrison v. Mitchell, Fitzg. 303; s. c. *sub nom.* Harrison v. Weldon, 2 Stra. 911; and in Nicol v. Askew, 2 Moo. P. C. 92. *Cf.* Trower v. Cox. 1 Addams. In Hayle v. Hasted, 1 Curt. Ecc. 240, Sir Herbert Jenner stated the rule to be that parties whose interests were affected by a will previously proved in solemn form, might call in the probate and require the will to be re-propounded, upon showing "that there has been fraud or collusion practised to their prejudice, or that there has been neglect or mismanagement in the conduct of the suit." And the same judge, in Wilkinson v. Robinson, 14 Jur. 72, decreed probate of a later will, notwithstanding an earlier will had already been admitted to probate and the executrix named therein was out of the jurisdiction of the court and could not be cited.

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CABLE *vs.* CABLE.

(76 Iowa, 163.)

EXECUTOR.—ACTION TO COMPEL TO QUALIFY OR TO RENOUNCE.

An heir cannot maintain an action to compel the executor named in the will to qualify or to renounce the appointment; and such a person not having qualified, is accountable for property of the decedent in his possession not to the heir but to the personal representative.

APPEAL from an order of the District Court of Des Moines County.

T. J. Trulock, for appellant.

La Monte Cowles, for appellee.

SEEVERS, C. J. It is stated in the petition that Jonathan Cable made and executed his last will and testament, which was duly admitted to probate. The testator devised all his property to his widow, Sarah B. Cable, to be used, controlled, and disposed of as she deemed best, and she was appointed sole executrix, without bonds. Mrs. Cable qualified as such executrix, and departed this life prior to the commencement of this action. The will further provides that after the death of the testator's widow his two daughters, Sarah E. and Mary Jane, should administer upon the estate. Then followed a provision under which the appellant claims he is entitled to a share of or interest in such estate. The petition states that the defendant Sarah E., "appointed by her father executrix of said will, has not renounced the same, and has hitherto neglected to take the oath prescribed by law, * * * notwithstanding more than ten days have elapsed since the will was admitted to probate." It is further stated that "all the personal property, books, papers, contracts, and money * * * belonging to said estate are in possession of the defendants." It is further stated

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that the widow of Jonathan Cable never elected to take under the provisions of the will, but elected to take "the interest in said real estate allowed by law, and as provided by law." The relief asked is that Sarah E. Cable be summoned to appear and qualify as executrix within a time prescribed by the court, or that she be deemed to have surrendered the appointment made under said will, and "that they and each of them be required to file in this court an inventory of the property left by Jonathan Cable." There was a demurrer to the petition, which was sustained, and the plaintiff appeals.

We have some doubt whether we understand the object of this action, but it seems to us that such object must be to compel the defendants, or one of them, to accept and qualify as an executor or renounce the same in some formal manner. This whole subject is regulated by statute, or, if not, there is no provision of the statute under which any person can be compelled to act as an executor; and under the allegations of the petition it clearly appears the persons named in the will as executors have declined to accept the executorship, or, if this is not the proper construction of the petition, then we think it must follow, under the allegations of the petition, that the defendants or neither of them have qualified as executors, as required by law. This being true, they are not executors, and the court has no power or authority to require them to file an inventory at the instance of the plaintiff. If they have property belonging to the estate, they must account therefor to the personal representative; that is, either to an executor or administrator. If, as stated in the petition, the defendants or one of them have failed to qualify as executor, as provided by law, then a vacancy has occurred, and upon proper application to the court no doubt an executor or administrator will be appointed. We think the court rightly held that the plaintiff is not entitled to the relief asked.

Affirmed.

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STURGIS *vs.* WORK.

(122 Indiana, 134.)

DEVISE.—ERRONEOUS DESCRIPTION OF PROPERTY.—RESIDUARY DEVISE.—EFFECT OF CODICIL.—DIMINUTION OF SHARE OF ONE OF TWO DEVISEES.

A devisee, being a mere volunteer, has no equity to reform a description of property never owned by testator to render it applicable to property which he did own.

Where a will gives all the residue to the testator's two sons and a codicil in language equally clear and decisive gives the same subject matter to all of his children share and share alike, the codicil must prevail.

Where a tract of land is devised in specified proportions to two devisees and the share given to one is diminished by codicil, the part so taken away will not go in augmentation of the part given to the other.

APPEAL from a judgment of the Circuit Court of Allen County.

T. E. Ellison and *L. M. Ninde*, for appellants.

P. A. Randall and *W. J. Vesey*, for appellees.

MITCHELL, C. J. Robert Work, late of Allen County, died testate on the 3d day of July, 1886. By his last will and testament, to which, after it was first executed, there were added two codicils, he disposed of all his real and personal estate. One of the subjects of controversy arises out of the eighth clause of the will, by the terms of which the testator devised to his two daughters, Mary F. and Eliza J. Shoaff, an 80-acre tract of land in De Kalb county, which is described as the "west half of the *south-west* quarter" of a certain section, township, and range. The testator never owned the tract described in the will, but did own and have as part of his estate the west half of the *north-east* quarter of the section, township, and range above mentioned. The devisees sought to show these facts as a basis for the inference that the testator must have in-

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tended to dispose of the property actually owned by him, and that the description as found in the will must therefore have been the result of inadvertence or mistake. The ruling of the court below was adverse to the devisees upon this point.

It is an established rule that the chancery powers of a court cannot be invoked to reform a will by eliminating words or phrases, and supplying others, so as to make the instrument conform to what may be supposed to have been the real intention of the testator. *Funk* v. *Davis*, 103 Ind. 281; *Judy* v. *Gilbert*, 77 Ind. 96; *Sherwood* v. *Sherwood*, 45 Wis. 357. The reason is, that an action to reform a written instrument is regarded as essentially an action for specific performance. A devisee is a mere volunteer; the making of a will being a voluntary act, there is, therefore, no consideration to support the action, as in actions to reform deeds or contracts. "Volunteers under wills have no equity whereon to found a suit for specific performance." Wigram Wills, 47. Extrinsic evidence may be admitted in a proper case, where the effect of it is merely to explain or make certain what the testator has written, but such evidence is never admissible to show what the testator intended to write. If the testator had devised the land by some general description by which it might have been identified, as for example, if he had said, "all my land" in a certain section or township, or "the lot purchased by me from A.," or "the tract of land occupied by B.," and had then added an erroneous particular description, a case would have been presented for the admission of extraneous evidence, within the rule which holds, where there is a false description, either of the devisee or of the thing devised, if the will nevertheless contains a sufficient general description of the person or thing it will take effect, notwithstanding the erroneous particular description. *Cleveland* v. *Spilman*, 25 Ind. 95; *Winkley* v. *Kaime*, 32 N. H. 268; *Allen* v. *Lyons*, 2 Wash. C. C. 475; 1 Redfield Wills, P. 585.

Extrinsic evidence is not admitted in any case, with

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a view of reforming or adding anything to the will, but for the purpose of arriving at the real intent of the testator, by identifying the person or thing generally described, and to remove the ambiguity resulting from the erroneous particular description. *Daugherty* v. *Rogers*, 119 Ind. 254, 20 N. E. Rep. 779.

It is said that courts should assume in every case, whether there be a general description of the land devised or not, that the testator intended to dispose of property of which he was the owner, and that hence evidence ought to be admitted to show that a description, as contained in the will, was a mistake, so as to prevent wrong and injustice. To do this would however, violate the fundamental principle that a will, in order that it may be regarded as the legal declaration of a man's intention, which he wills to be performed after his death, must be in writing signed and witnessed, and that the intention of the testator is always to be deduced from the words actually written in the will. That which the statute requires to be in writing cannot be supplied by oral testimony. In respect to this point there was no error in the ruling of the court.

After making various specific devises of real estate, the testator, in the instrument originally signed as his will, disposed of what might remain in the following language: "*Tenth.* The residue of my real estate, not heretofore disposed of, I give and devise absolutely in fee-simple to my sons, Wesley I. Work and Robert Carey Work, share and share alike."

By the terms of the second codicil to his will, the testator first revoked a devise of certain real estate made to one of his daughters, and directed that it should constitute a part of the residue of his estate. Certain absolute bequests and devises, theretofore made to his wife, were also modified and changed, so that in case of her marriage or death, the property devised and bequeathed to her was to become a part of the residue of his estate. This codicil closed with the following clause:

"I give, devise, and bequeath to all my children, and

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their issue, share and share alike, all the residue of my estate not herein specifically devised and bequeathed."

A controversy arose over the two clauses of the will last above set out.

Accepting as correct the statement that all rules for the construction of wills are valuable only so far as they aid in ascertaining the testator's intention, the question is, can it fairly be said that the testator intended both of these residuary clauses to have effect? The intention of the testator is to be collected from the entire will, and all papers which constitute the testamentary acts, including will and codicils, must be regarded as constituting the will. Schouler, Wills, § 468. All these, no matter when actually written or signed, are to be considered as giving utterance to the testator's intention concerning the disposition of his estate on the day of his death, thereby becoming in fact his last will and testament. We have therefore two clauses of a will, both of which took effect at the same moment, the first of which directed that the residue of the testator's real estate, not theretofore disposed of, should go to his two sons, share and share alike, while the last clause declared in language equally unequivocal, that all the residue of his estate not therein specifically devised and bequeathed, should go to all his children, share and share alike. While it is true that a codicil is to be so construed as not to interfere with the disposition of property made in the will, to any greater extent than is required to give full effect to the codicil, it is also true that if any of the provisions of the codicil are repugnant to provisions contained in the will, the codicil is to be regarded as the expression of the testator's final determination upon the subject. The general position is well supported that where the terms of the will are clear to give an estate, the words of a codicil must manifest an intent equally clear to revoke it. *Hearle* v. *Hicks*, 8 Bing. 475; *Quincy* v. *Rogers*, 9 Cush. 291. It is undoubtedly settled, too, that, where an estate is given in one clause in clear and decisive terms, the estate so given cannot be taken

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away or cut down by any subsequent clause that is not as clear and decisive as the one in which the estate is given. *Bailey* v. *Sanger*, 108 Ind. 264, *Bruce* v. *Bissell*, 119, Ind. 525-531, and cases cited; *Roseboom* v. *Roseboom*, 81 N. Y. 356; *Freeman* v. *Coit*, 96 N. Y. 63.

Neither of the clauses in question purports to be a devise of a particular estate, to the persons therein named. Both are residuary in character, and purport to be a disposition of any undisposed-of residue that may be owned by the testator when the will takes effect. "Residue means all of which no effectual disposition has been made by the will other than the residuary clause."

Formerly a testator was only permitted to devise the real estate which he actually owned at the time the will was made, but by statute (section 2567, R. S. 1881) after-acquired real estate may pass by a will, the same as that owned at the time of the execution of the will. Residuary clauses are employed more especially, so far as they relate to real estate, to dispose of after-acquired property, and to carry lapsed or void devises. Each of the clauses under consideration purports to dispose of all the real estate owned by the testator not theretofore specifically devised. This, of course, means all the real estate of which he might be the owner at the date of his death which had not been theretofore otherwise disposed of. Both clauses cover the same subject-matter. The first in clear and decisive language gives all the residue to the testator's two sons. The last, in language equally clear and decisive, gives the same subject-matter to all of his children, share and share alike.

It should be observed that substantially no real estate is devised or disposed of by the codicil in question except what may be disposed of by the last or residuary clause. The language used in the codicil must, therefore, be regarded as referring to the real estate specifically disposed of in the will. Both the will and the codicil came into operation and effect together, and together constitute the last will and testament. They

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can not be read as though the will spoke as of one date and the codicil of another; Except as we have already seen, in so far as they are repugnant to each other, the codicil must prevail, as being the "later and better thought" and final expression of the testator. In respect to the point here involved the court gave an erroneous construction to the will. The last clause must control the undisposed-of residue.

By the fifth clause of the will the testator devised to his daughter Sarah Ellen Hilligass one hundred and fifty acres of land, to be taken off the east side of a certain described tract, and by the seventh clause he devised to his son Wesley F. Work, and Elizabeth Work, his daughter, all the remainder of the tract, except the one hundred and fifty acres theretofore devised to Mrs. Hilligass. By a codicil subsequently executed the testator modified the fifth clause of his will, so as to reduce the number of acres previously given to Mrs Hilligass from one hundred and fifty to one hundred acres. The seventh clause, in which the remainder of the tract, excepting one hundred and fifty acres, as originally devised to Mrs. Hilligass, was devised to Wesley F. Work and his daughter, was in no wise changed. The question is whether the fifty acres taken from Mrs. Hilligass by the codicil were carried to Wesley F. and his daughter by force of the seventh clause in the will. A negative answer must be given to this question. The modification of the fifth clause by taking off fifty acres from the tract originally devised to Mrs. Hiligass, did not, without more, add anything to the seventh clause, which gave the remainder of the tract, excepting one hundred and fifty acres, to the parties therein named. The rule is that where an estate is given to two, if the part given to one fail from any cause, that part, without a fresh disposition of it, will not go in augmentation of the part given the other, but will fall into the residue, or go to the next of kin. 2 Jarman Wills, p. 368. Where a tract of land or sum of money is given in specified proportions to two persons, we can discover no principle which would sup-

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port the conclusion, in case the share given one was diminished or entirely revoked, that it would, in the absence of some express words, go to the other. Upon this point the court below fell into an error. In respect to the other question suggested, involving the disposition of the money arising from the life insurance policy, the conclusion of the court was correct. In so far as the conclusions of law stated by the court are not in accord with the foregoing opinion, the judgment is reversed, with costs, with directions to the court to restate its conclusions of law and to render judgment in consonance with this opinion.

As to general residuary clauses, see Ricker v. Cornwell, 6 Am. Prob. Rep. 415, and Floyd v. Carow, 2 Am. Prob. Rep. 499.

HART *vs.* JOHNSON.

(81 Georgia, 734.)

LEGACIES.—ADEMPTION.

Specific bequests to testator's daughters of certain sums of money, *held*, not to be adeemed by gifts of the same amount to their husbands, nothing being said by testator at the time as to the gifts being in lieu of the legacies.

APPEAL from a judgment of the Superior Court of Glasscock County. The facts appear in the opinion.

Reese & Little, by *Harrison & Peeples*, for plaintiffs in error.

Thos. E. Watson, for defendants in error.

BLANDFORD, J. Samuel Hart made a will, by which he devised to two of his daughters $500 each. They subsequently married, and he advanced to their husbands $500 each, without at the time stating whether it was in lieu of the legacy to the daughters or not, al-

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though there was evidence to the effect that he subsequently said that the money was advanced to them in lieu of the bequest. The court below held that this was not an ademption of the legacy, and a recovery was had in favor of the daughters, against the executors of the testator for the amount of the bequest; whereupon the executors excepted. We agree with the court below that this was not an ademption of the legacy to the daughters. The testator said nothing to his sons-in-law, at the time he gave them this money, as to its being in ademption of the legacies. What he said on this subject, as testified to by the witnesses, was said at a subsequent time, and was not said in the presence of the daughters or sons-in-law. Besides, this will was made subsequent to the "woman's act" of 1866, under which the wife is a *feme sole* as to her property at the time of her marriage, and as to property given to, inherited, or acquired by her afterwards. These daughters married after the making of the will. We find a case which runs *quatuor pedibus* with this—*Ravenscroft* v. *Jones*, 32 Beav. 669. In that case the testator, by his will, bequeathed to his daughter a legacy of 700 pounds, she being then unmarried. She having afterwards become engaged to be married, her father sent her, by her mother, 100 pounds, which she used in procuring her wedding outfit. After her marriage, the testator sent by his wife, to the daughter's husband, 400 pounds, and the husband thanked the father-in law, who said he hoped it would do him good. Nothing was said by the testator, at the time of these gifts, of any ademption of the legacy. The wife of the testator testified, however, that from what her husband said to her, she had no doubt that he intended these sums as part of the legacy. The Master of the Rolls, Sir JOHN ROMILY, held that this was no ademption of the legacy, and that the legacy could not be done away with by what the testator said subsequent to the giving of this money, nothing having been said, at the time the gifts were made as to such purpose and intention; and that, if he had intended to adeem the legacy, he might have stated

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so subsequently in the codicil to his will. We think that is the law of this case; and the judgment of the court below is affirmed.

See further as to ademption of legacies Burnham v. Comfort, 6 Am. Prob. Rep. 273, and note thereto, as to whether the doctrine of ademption by advancement is applicable to devises of realty; and Roquet v. Eldridge, *infra*.

SIDDONS *vs.* COCKRELL.

(131 Illinois, 653.)

LIFE ESTATES AND REMAINDERS.—CONSTRUCTION.

A testator directed as follows: "I devise and bequeath to my wife, so long as she remains my widow, the net use and control of all the real-estate and personal property of which I may die seized, for the support of herself and my children. Should she marry, from and after such marriage she shall have and control only one-third in value of the real estate, and one-third of the personal property then remaining, absolute. Should she survive all my children, they having died without issue,I devise and bequeath all my real estate and personal property to be hers, her heirs and assigns, forever. But in case of the death of my wife, leaving any of my children surviving, I devise and bequeath to them all of my estate in equal proportions, share and share alike; the heirs of any of my children taking their deceased parent's share." The widow married again. *Held* (a)that her interest in the third of testator's land was only a life-estate. (b) That the devise to the children vested at testator's death and that the share of one of them who died unmarried before the widow's marriage passed to its heirs.

APPEAL from a judgment of the Circuit Court of Peoria County.

Frank R. Henderson, for the appellant.

Judson Starr, for the appellees.

McCulloch & McCulloch, for Charles A. Cornwall.

SCHOLFIELD, J. The second clause of the last will and testament of William Y. Hervey reads as follows: "I

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will, devise, and bequeath to my beloved wife, Nancy Martha, during and so long as she remains my widow, the net use and control of all the real estate and personal property of which I may die seized, wherever the same may be situated or found, for the support of herself and my children. Should she marry, from and after such marriage she shall have and control only one-third in value of the real estate, and one-third of the personal property then remaining, absolute. Should she survive all my children, (they having died without issue,) I will, devise and bequeath all my real estate and personal property to be hers, her heirs and assigns, forever, But in case of the death of my wife, leaving any of my children surviving, I will, devise and bequeath to them all of my estate, in equal proportions, share and share alike, the heirs of any of my children taking their deceased parent's share. The personal property I devise in the same manner I have devised the real estate, and subject to the same order of distribution." The testator was the owner of several hundred acres of valuable lands, and of a large amount of personal property, at the time of his death. His widow named in the will, and six children, survived him. After the death of the testator the widow married again. One of the children died in infancy, and before the subsequent marriage of the widow. Another one of the children married, had a child (who is still living) born to her, and after the birth of such child, and the subsequent marriage of the widow, conveyed to another her interest in the testator's real estate, and thereafter died intestate. The other children are still living.

The questions before the court below were: (1) does the widow take a fee, or a life estate, after her marriage, in the one-third then given her in the real estate; (2) was a fee vested in the children which could pass by descent immediately upon the death of the testator. The court below found that the widow took a life estate, only, in one-third of the real estate, after her marriage, and that a fee was vested in the children immediately upon the testator's death, which passed, up-

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on the death of the child dying in infancy, and before the subsequent marriage of the widow, to the heirs at law of such child. The appellant contests the first of these rulings, and those appellees who are children of the testator contest the last. The other appellees insist upon the correctness of both rulings.

1. Counsel for appellant argue that by the use of the words "from and after such marriage she shall have and control only one-third in value of the real estate and one-third of the personal property then remaining, absolute," the testator clearly intended to vest a fee in the real estate in his widow; that "have" means "ownership;" "from and after," being unlimited or qualified by other words, mean "thenceforth forever;" and that "absolute" refers to both the real and the personal estate, and, applied to the real estate, means a fee-simple, in contradistinction to a lifeestate. If nothing but these words were to be considered in connection with the devises, there would be much force in the argument, but the familiar rules of construing wills require, if it can be reasonably given, such a construction as shall give force and effect to every word and clause, and, if a prior and a subsequent clause are repugnant, that the prior clause shall be restrained or modified by the subsequent clause. *Walker* v. *Pritchard et al.*, 121 Ill. 221, 12 N. E. Rep. 336. It will be observed, that in clauses subsequent to that referred to and relied upon by the counsel, the testator assumes to devise all of his real estate *in fee* to his children or to his widow. It is, of course, impossible to give one-third of his real estate in fee to his wife, and all of his real estate in fee to his children; and yet the word "all," in this connection, is unqualified, expressly or impliedly, by any modifying word. But a devise of land without the use of the word "heirs," or other words necessary at common law to pass a fee, is only to be construed as a devise of a fee, when it does not appear from the entire will, that a less estate was intended, (*Walker* v. *Pritchard, supra.*) And since it could not have been intended to devise by the subsequent clause what was devised by the prior

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clause, and the language of the subsequent clause has preference in determining what is devisd by that clause, it must have been intended by the first clause to devise a life estate, as between a devise of which, and of a fee in the same land, there is no necessary repugnance. It will also be further observed, that the testator, in the first clause, uses the language, "she shall have and control," but in the subsequent clause he uses the language, "devise and bequeath all my real estate. * * to be hers, her heirs and assigns, forever." This change of phraseology plainly shows that what was intended by the latter was different from that intended by the former, and that the testator knew, and had in his mind at the time, what language to use to devise a fee, so that his meaning could not be misunderstood. The meaning of the word "absolute," in the connection in which it occurs, in our opinion, has reference to the personal property, only, and was not intended to be descriptive of the real estate.

The widow might, had she so elected, have renounced under the will, and have taken the interest in the testator's estate that she would have taken had he died intestate,—namely, dower in the lands, (Rev. St. 1874, section 1, c. 41,) and, "as her absolute personal estate, one-third of all the personal estate," (Rev. St. 1874, clause 4, § 1, c. 39,) And it is fairly to be inferred that the testator intended, that if his widow married again she should have only what she would have taken under the law if he had made no will, or what she would have taken under the law by renouncing under his will, and in spite of his will. Such provisions are presumably intended to discourage, rather than to invite, subsequent marriages, and it would therefore be unreasonable to assume that the word "absolute" was here intended to express the idea of a conveyance of real estate in *fee*, so long as any other rational meaning can be assigned to it.

There is another view that we think might well be taken of the intention in using that word. The use and control given of the property devised, before sub-

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sequent marriage, is expressed to be, for the support of the widow and the testator's children, but the property given to her afterwards is for herself alone; and so the word "absolute" may reasonably be held to express that idea,—the unrestricted (*i. e.*, absolute) use by the widow, for herself, in contradistinction to the former joint use, for herself and the testator's children. The words "from and after" imply futurity, indefinitely, simply, and are clearly restricted by the purpose of the devise, as manifested by the entire will.

2. In the absence of a clearly manifested intention to the contrary, it must be presumed that the testator intended to dispose of all of his estate. So, also, the heir-at-law is not to be disinherited, unless the intent to do so is very clearly expressed. 1 Redfield on Wills, § 18, p. 434. The devise of the use and control of the real estate being in effect, a devise of the real estate itself, the devise, in the first instance, was of a life estate, determinable, however, as to two-thirds thereof, upon the subsequent marriage of the widow, (1 Preston on Estates, 442;) and there is a reversion still left in the testator to be devised, (Tiedeman on Real. Prop., § 386; *State* v. *Brown*, 27 N. J. L. 20; *McElway* v. *Seymour*, 29 N. J. L. 329). The devise of the reversion in the two-thirds of the real estate, in the event of the subsequent marriage of the widow, would therefore have to take effect immediately upon such marriage, and we must assume that the testator intended that it should then take effect. But there is nothing in the language of the will that warrants the conclusion that the title devised was intended to be vested at different times, although the enjoyment of one-third of the estate is postponed until after the death of the widow. The will should therefore be read as follows, after the devise to the widow: I devise all my remaining real and personal estate to my children, and if any children be dead leaving children surviving them, then to them, also,—the children of a deceased child taking the part of their parent; but if all my children shall die without issue, before my wife shall

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die, I devise the same to her. The estate devised is clearly intended to be a fee-simple in whomsoever shall take. The title was intended to vest immediately upon the death of the testator, and so, necessarily, he must have intended children or children's children in being at his death; and the deaths contemplated were necessarily deaths in the lifetime of the testator. *Briggs* v. *Shaw*, 9 Allen, 516; *Fulton* v. *Fulton*, 2 Grant's Cases, 28; *Moore* v. *Lyons*, 25 Wend. 118; *Freeman* v. *Cort*, 96 N. Y. 68.

We find no error in the record. The judgment is affirmed.

See also as to life estates, Robison v. Female Orphan Asylum of Portland, 6 Am. Prob. Rep. 51 and the note; Davies v. Davies, 6 Am. Prob. Rep. 361, and the note; Walker v. Pritchard, 6 Am. Prob. Rep. 381, and the note; Snyder v. Baker, 6 Am. Prob. Rep. 552, and the note.

DAVIS *vs.* SEMMES.

(51 Arkansas, 48).

ATTESTATION.—MARK IN LIEU OF SIGNATURE.—ILLITERACY.

A statutory provision (Ark. Code Civ. Proc. 6344) providing that a signature to a will shall be deemed to "include mark when the person cannot write, his name being written near it and witnessed by the person who writes his name as a witness," does not preclude other proof of the attestation where the person writing the witness' name fails to sign his own name; nor is signature by mark permitted solely upon the ground of illiteracy.

APPEAL from a judgment of the Circuit Court of Monroe County.

Grant Green, Jr., for appellant.

John C. Palmer, for appellee.

COCKRILL, C. J. The question in this case is, can one become an attesting witness to a will by making

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his mark, when the person who writes the name of the witness fails to sign his name as witness of that fact? A subscribing witness, like the testator himself, signs most appropriately by subscribing his name in his own handwriting; and there is much reason why a witness, intelligent and able-bodied enough to do this, should be chosen to perform the office. Nevertheless a will may lawfully be subscribed by mark by a testator, or witness. It was so held, as to the testator, by this court under the statute now in force, *Cornelius' Case*, 14 Ark. 675. See, too, *Gatline* v. *Price*, 23 Ark. 396. The reasons which control in sustaining the testator's subscription by mark apply also to the subscribing witness, when the governing provisions of the statute are similar. This is the rule recognized by the authorities. *Schouler, Wills*, § 313, and cases cited. It is argued that the statute has been changed since the decision in *Cornelius' Case, supra*, by the code of civil practice in which it is declared that in construing its provisions a signature or subscription shall be held to "include mark, when the person cannot write, his name being written near it, and witnessed by the person who writes his [own] name as a witness," (Mansfield's Digest, § 6344). It is argued from this that the mark of a witness cannot be taken as his signature unless it is accompanied by the signature of the person who wrote the witness' name. In *Miller, ex parte*, 49 Ark. 18, 3 S. W. Rep. 883, this provision of the statute was under consideration, and it was ruled that it did not mean that the signature of the person who wrote the name of the witness should be the exclusive evidence of the witness' signature. It was intended, as there explained, merely to put a signature by mark on the footing of a signature by writing, when made in accordance with the statute, and not to exclude other proof of the signature by mark. Now, if we concede that this provision of the statute has any application to the execution of a will, the construction placed upon it in *Miller, ex parte*, which we think is its true meaning, left the attesting witnesses free to prove their signatures as they did in

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this case. The statute governing the probate of wills requires every subscribing witness, if he can be produced, to prove his own signature, (Mansfield's Digest, § 6514 *et seq.*;) and if the person who wrote the witnesses' names in this case had attested that fact by his signature in accordance with the provisions above quoted, it would not have dispensed with the subscribing witnesses' testimony or added anything to the force of their evidence. As was explained in *Cornelius' Case*, *supra*, when a signature by mark is permited, it is not solely upon the ground of the illiteracy of the subscriber, and his signature is not rejected merely because it is shown that he could write. See, too, *Schouler*, *Wills*, §§, 313, 314, and notes. The record shows that the court acted upon the presumption that the signature of the person who wrote the witnesses' names was essential to the attestation and the judgment rejecting the will will be reversed, and the cause remanded for a new trial

Signing by Mark.—In *Ex parte* Miller, 49 Ark. 18, cited in the principal case, a petition for the prohibition of the sale of intoxicating liquors within three miles of a certain church in Desha county was presented to the County Court. Some of the signatures thereto were by mark, not attested by any witnesses. On the hearing in the Circuit Court, the petitioners tendered evidence to prove that these signatures were genuine and that the persons who wrote the names of the signers by mark were thereunto properly authorized. But the court refused to permit such testimony. The petitions also offered to show that if the signatures by mark were counted the petition contained a majority of the adult inhabitants residing within the territory mentioned.

The court denied the prayer of the petition; but the Supreme Court held that the proposed evidence was competent; that the provision of the Code (Mansf. Dig. Sec. 6344) defining signatures or subscriptions to include mark, when the person cannot write, his name being written near it and witnessed by a person who writes his own name as a witness, only means that such a signature is not to be taken *prima facie* as genuine without other proof of signing. "It was not intended to exclude such proof."

In Guthrie v. Price, 23 Ark. 396, 402, 403; on motion of the petitioners the court below instructed the jury as follows: "If the jury believe, from the evidence, that the signature or name of Susan Guthrie, signed to the will, is not in her proper handwriting, and that her name was signed by some other person, unless they further find

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from the evidence, that the person who wrote her name, wrote his own name as a witness to such will, and stated that he signed her (the testatrix's) name, at her request, they should find for the petitioners, that the paper produced is not the will of Susan Guthrie." But the Supreme Court held that in giving this instruction the court ruled directly contrary to the decision. In the matter of the Will of Cornelius, 14 Ark. 675, where it was held that if the testator's name were written to the will by another person and he made his mark, it was a valid subscription within the meaning of the statute.

HARDING *vs.* LITTLEHALE.

(150 Massachusetts, 100).

LIFE INSURANCE.—WHETHER PAYABLE TO HEIRS OR TO EXECUTOR.

Where a statute authorizes the insurance of an applicant for his own benefit, the proceeds of the policy going to his personal representatives for the benefit of his estate, and testator in his application stated that the insurance was for the benefit of "myself," the proceeds of the policy must be administered as a part of his estate under his will; notwithstanding the form of the policy by which the company agrees to pay "to the executors or administrators of said member in trust, however, for, and to be forthwith paid over to his heirs-at-law."

APPEAL from a decree of the Superior Court of Bristol County.

W. C. Parker and *E. L. Barney*, for appellants.

L. Le. B. Holmes, for appellee.

KNOWLTON, J. The St. of 1885, c. 183, made important changes in the law relative to life and casualty insurance on the assessment plan. Section 1 is as follows: "Every contract whereby a benefit is to accrue to a party or parties named therein, upon the death or physical disability of a person, which benefit is in any degree or manner conditioned upon the collection of an assessment upon persons holding similar contracts,

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shall be deemed a contract of insurance on the assessment plan, and the business involving the issuance of such contracts shall be carried on in this Commonwealth only by duly-organized corporations which shall be subject to the provisions and requirements of this act; but nothing herein contained shall be construed as applicable to organizations which conduct their business as fraternal societies, on the lodge system, or to organizations which do not employ paid agents in soliciting business, or limit their certificate-holders to a particular order or fraternity, or to the employes of a particular town or city, designated firm, business house, or corporation; or to organizations which are unincorporated, and limit the amount of every certificate issued to a maximum amount, not exceeding five hundred dollars on any one risk. If the benefit is to accrue through the death of the insured person, the contract shall be of life insurance; if through the accidental death only, or the physical disability, from accident or sickness, of the insured, it shall be of casualty insurance."

In the first part of the section is a broad and comprehensive definition of insurance on the assessment plan. The last part of the section marks the distinction between life insurance and casualty insurance. In the middle of the section, certain classes of organizations are excepted from the provisions of the act. Section 2 provides for the formation of corporations to carry on the business of life or casualty insurance on the assessment plan. Section 3 relates to existing corporations engaged in transacting that business, and authorizes the reincorporation of such corporations, with a proviso "that nothing in this act contained shall be construed as requiring or making it obligatory upon any such corporation to reincorporate, and any such corporation may continue to exercise all rights, powers, and privileges conferred by this act, or its articles of incorporation, not inconsistent herewith, the same as if reincorporated hereunder." This section gives existing corporations all the benefits of the

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statute, without their taking formal action of any kind, or making any change further than may be necessary to comply with the requirements of the act as to their management and the transaction of their business. It includes all corporations coming within the definition contained in § 1.

Under this statute there can be no doubt that a corporation may insure an applicant for his own benefit, and that in such a case the proceeds of the certificate after his death, will go to his executor or administrator, for the benefit of his estate. The provisions of §§ 10 and 11, which forbid insurance for the benefit of persons who have no interest in the insured life, and exempt from attachment the money to be paid under the certificate are not inconsistent with this construction. The limitations of the St. of 1874, c. 375, and of the St. of 1877, c. 204, § 1, (Pub. St. c. 115, § 8,) as interpreted in *American Legion of Honor* v. *Perry* 140 Mass. 580, and in *Daniels* v. *Pratt*, 143 Mass. 216, are not applicable to a certificate issued under this statute.

The next question in the case is whether the certificate before us was so issued. The corporation which issued it was organized in 1878, under the provisions of the St. of 1874, c. 375, and of the St. 1877, c. 204. It never had any by-laws in relation to the contracts between it and its members. There is nothing to indicate that it belonged to either of the classes of organizations excepted in § 1 of the statute which we have been considering. On the contrary, there are indications in the certificate and in the application, which fairly show, in connection with the report, that it belonged to neither of these classes. The sixth of the rules and conditions contained in the certificate provides for the accumulation "of the Emergency Fund required by the laws of this commonwealth," and shows that the corporation was acting under this statute, in compliance with the provisions of § 8. In other particulars, the certificate is made to conform to the requirements of the chapter, and the contract must be deemed to have been made by a corporation doing busi-

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ness with the enlarged powers conferred by recent legislation.

Construing the policy under the statute of 1885, it remains to inquire whether it provides a fund for the heirs of the insured, as individual beneficiaries, or for his estate, to be disposed of under the will. The statute permits parties to make a contract in either form. What was their intention, as shown by their language? By the first clause of the conditions of the certificate the application is expressly made a part of the contract. In the application, we find the only specific provision as to ownership in the question, "For whose benefit is this contract made (give relationship of beneficiary and full name)?" and in the answer, "Myself." The only doubt as to the construction of the contract is created by the words of the certificate in the printed blank, where the agreement of the corporation is to pay "to the executors or administrators of said member in trust, however, for, and to be forthwith paid over to his heirs at law." The chief purpose of this language is to state the undertaking of the corporation, and that is fully accomplished before the words "in trust" are reached. The final clause is a statement of the existence of a trust which is supposed to have been created by the designation of the insured in his application. In the present case these words are in direct conflict with the statement of ownership in the written portion of the contract, and it seems likely that they were inadvertently left in the printed blank.

In the absence of anything else to show an intention to make his heirs beneficiaries, we are of opinion that the words referring to a trust must yield to the language of the application, and that the proceeds of the certificate must be administered as a part of the estate of the insured, under his will.

Decree affirmed.

See Holland v. Taylor, 6 Am. Prob. Rep. 536 and monographic note to the point that the beneficiary of an insurance policy cannot be changed by will.

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MINOT *vs.* BAKER.

(147 Massachusetts, 348).

CHARITABLE USES.—DEATH OF TRUSTEE.—CONSTRUCTION.

A bequest to a trustee "to be disposed of by him for such charitable purposes as he shall think proper," creates a general charitable trust which a court of equity will not allow to fail by reason of the trustee's death without having exercised his discretion.

A testator deposited a certain sum with a trustee to pay the annual interests to a beneficiary, unless it was added to the principal sum, and after the death of the beneficiary, to pay the amount of the principal sum to the testator, his executors or administrators. The beneficiary was allowed, by the terms of the deposit, to have the interest added to the principal in order to increase it, and this was done for several years, and until the death of the beneficiary. The testator in his will gave the residue of his estate to charitable purposes. *Held*, upon the death of the beneficiary after the death of the testator, that the amount deposited as above, together with the additions of interest, went to form the residue of the testator's estate, and was to be devoted to charitable purposes.

HEARD in the Supreme Judicial Court before DEVENS J. and reported to the full court. Bill in equity for instructions, brought by William Minot, Jr., administrator *de bonis non* with the will annexed of Capt. John Percival, against Sarah B. Baker and others, next of kin of the testator, the Attorney-General appearing and claiming that the will created a general charitable trust.

E. M. Johnson, for the plaintiff, read the papers in the case.

E. H. Bennett, for nieces of the testator.

S. H. Phillips, for the Attorney-General.

C. M. Reed, for certain next of kin.

G. F. Tucker, for the executor of Maria Gassett.

HOLMES, J. This is a bill for instructions, brought by the administrator *de bonis non*, with the will annexed

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of Captain John Percival. The will appointed John P. Healey executor, and gave the residue to Healey, "to be disposed of by him for such charitable purposes as he shall think proper." Healey died, having disposed of only a small portion of the residuary estate in his hands for charitable purposes. The first question raised by the report is "whether the sum of $14,503.75, received by the plaintiff from the suit upon the bond of Healey, as executor of Percival's estate, and from the suit against Healey's administrator, should be paid to the next of kin of John Percival, by reason of the failure of said Healey to dispose of the fund in his life-time for the purposes specified in the residuary clause of the will of said Percival, or should be applied to charitable purposes, according to a scheme under the direction of the court." It is settled that the gift to Healey was a good charitable trust, *White* v. *Ditson*, 140 Mass. 351, 353, 4 N. E. Rep. 606; *Schouler* petitioner, 134 Mass. 426; *Saltonstall* v. *Sanders*, 11 Allen, 446, 453; *Wells* v. *Doane*, 3 Gray, 201; *Everett* v. *Carr*, 59 Me. 325; *Pocock* v. *Attorney-General*, 3 Ch. D. 342. *Chapman* v. *Brown*, 6 Ves. 404, 410; *Dundee* v. *Morris*, 4 Macq. 134, 158. There was no resulting trust on account of the vagueness of the objects, as there is in cases where the objects are not confined to charities. *Nichols* v. *Allen*, 130 Mass. 211. The first point to be determined, therefore, is a matter of construction, whether the limitation to charities was conditional upon Healey's making an appointment, or whether it should be construed as a gift to charitable uses out and out, with a superadded power to Healey to specify them if he saw fit; and on this part of the question we are of opinion that the gift is an unconditional gift to charitable purposes. There can be little doubt that such would be the construction adopted by the English courts, (*Attorney-General* v. *Fletcher*, 5 L. J. Ch. 75, 78; *Pocock* v. *Attorney-General*, *ubi supra*; *Moggridge* v. *Thackwell*, 7 Ves. 36, 13 Ves. 416; *Mills* v. *Farmer*, 1 Meriv. 55, 100; *White* v. *White*, 1 Bro. C. C. 12; *Baylis* v. *Attorney-General* 2 Atk. 239; *Attorney-General* v. *Hickman*, 2 Eq. Cas. Abr. 193; *Doy-*

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ley v. *Attorney-General*, Id. 194; *Anon.*, Freem. 262 *b.* *Copinger* v. *Crehane*, *Ir Rep.* 11 Eq. 429). Although a different opinion has been intimated in some American cases, at least where there is a naked power not coupled with a trust, *Fontain* v. *Ravenel*, 17 How. 369, 388, 399, (explained and limited by *Russel* v. *Allen*, 107 U. S. 163, 169, 2 Sup. Ct. Rep. 327.) The question must be kept distinct from other questions which do not bear upon the meaning of the words, such as whether a trust for charity generally is valid, or whether a court of equity can and will exercise so general a discretion as is necessary to carry out the trust, etc. If the meaning of the words alone is considered, it appears to be tolerably plain that the English construction is right. The nature of the gift shows that an application of the funds to charity is the dominant object, and that the selection by the trustee is subordinate, or means to an end. It is not like a gift to a particular charity which fails; there the specific object of bounty or end of the trust may well have furnished the main motive of the testator for giving to charity at all. But to give a power of selection to a party who takes no interest in the fund cannot be supposed to be the main motive of such a trust as we are considering; and the motive of charity goes no further than charity generally, because the testator leaves the rest to his trustee. The testator, in such a case, says, in effect, I give the fund in trust for charitable purposes, and, to save application to the court, I authorize the trustee to determine the scheme. In the ordinary case of trusts for such persons of a class as the trustee shall select, when a duty to select is imposed upon the trustee by implication, a general intention to benefit the class is recognized, and the trust will not fail if the trustee accepts it, and then fails to make a selection. *Brown* v. *Higgs*, 4 Ves. 708, 5 Ves. 495, 8 Ves. 561; *Burroughs* v. *Philcox*, 5 Myl. & Cr. 72; *Penny* v. *Turner*, 2 Phillips, 493; *Harding* v. *Glyn*, 1 Atk. 469; *Mahon* v. *Savage*, 1 Sch. & Lef. 111; *Spring* v. *Biles*, Id. 113, note; s. c. 1 T. R. 435, note; *Salusbury* v. *Denton*, 3 Kay & John. 529; *Nichols* v. *Allen*,

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130 Mass. 211, 219 ; *Drew* v. *Wakefield*, 54 Me. 291. Here there is a trust, not a mere power, and it was recognized in *White* v. *Ditson*, *ubi supra*, that a duty was imposed upon Healey to act, which is a strong circumstance in favor of the construction that the benefit is not intended to be made dependent upon his acting. *Brown* v. *Higgs*, 8 Ves. 561, 571, 574 ; *Cole* v. *Wade*, 16 Ves. 27; *Moggridge* v. *Thackwell*, 7 Ves. 36, 82. And it being settled that in some cases you can separate the general intent from the mode of execution, the nature of the gift in the particulars to which we have adverted already, seems to us to make the case a stronger one for doing so than where the selection is to be made from relations or the like, as in the decisions cited. At all events, this case is nearer to those than to a gift to such persons as A. may appoint. *Mills* v. *Farmer*, *ubi supra*. For there the limitation is as wide as the world, and, if A. does not take the beneficial interest it is impossible to suppose that a gift is intended unless he exercises the power confided to him. But charitable purposes constitute a well-defined class, to which it is entirely conceivable that a testator should make a gift. We shall consider the validity of such a gift in a moment.

The construction of the will being what we have declared, the question arises whether a trust originally valid is to fail for want of a trustee, contrary to the general doctrine of equity. There is no doubt that, if there were a very slight indication of the direction which the testator meant his bounty to take, a court of equity would find itself able to carry out the will. In *Schouler* petitioner, *ubi supra*, the gift was for "charitable purposes, masses, etc.," and the court appointed a new trustee. See, also, *Copinger* v. *Crehane*, Ir. Rep. 11 Eq. 429. But it is argued that when the gift originally is, or through the failure of the first trustee to exercise his discretion, afterwards becomes, a gift to charitable uses *simpliciter*, then the disposition of the fund in England was in the king as *parens patriae*, by the sign-manual, and that a court of equity, as such,

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has no jurisdiction. It is to be observed, that the objections to the exercise of the power to frame a scheme in the case supposed are not at all similar to those which apply to a diversion by the sign-manual, to wholly different uses of property devoted to a specific purpose which fails, because contrary to the policy of the law for instance, as in the well-known case of *Da Costa* v. *De Pas*, 1 Ambler 228, s. c. 2 Swanst. 487, where a legacy to establish a Jesuba, or assembly for reading the law and instructing people in the Jewish religion, was devoted to the Foundling Hospital for the instruction of the children in the Christian religion. In such a case there is no pretence, or only a pretence, of carrying out the directions of the testator. His will is arbitrarily overriden. *Moggridge* v. *Thackwell*, 7 Ves. 36, 81. But in a case like the present, whether the machinery used is the sign-manual, or a scheme prepared under the direction of the court, the testator's wishes are carried out as he has expressed them, just as they might be by the appointment of a trustee, or by the framing of a scheme in those cases where the jurisdiction of the court is admitted. The only objection on the ground of policy to the court's entertaining jurisdiction which has occurred to us is, that it must choose from too wide a field when there is nothing more specific to guide it than a general direction to apply the fund to charitable purposes. If the objection in this general form were sound, a trust for charitable purposes generally ought to have been held void, whereas all the English cases imply, and express decisions establish, that it is valid. *Nichols* v. *Allen*, 130 Mass. 211, 221; *Moggridge* v. *Thackwell*, 7 Ves. 36, 80; *Paice* v. *Archbishop of Canterbury*, 14 Ves. 364; *Legge* v. *Asgill*, Turn. & Russ. 265, note; *Dolan* v. *Macdermot*, L. R. 3 Ch. 676; *Pocock* v. *Attorney-General*, 3 Ch. D. 342; Anon., Freem. Ch. 261., Case 330 *b*. It has been said that "the court never, in trusts or powers, exercises a discretion." *Felan* v. *Russell*, 4 Ir. Eq. 701,704. But the court has never hesitated to frame a scheme,

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or to make a choice of the individual beneficiary, when the species of charity was indicated. *Baylis* v. *Attorney-General*, 2 Atk. 239; *White* v. *White*, 1 Bro. C. C. 12; *Mills* v. *Farmer*, 1 Meriv. 55, s. c. 19 Ves. 483; *Attorney-General* v. *Gladstone*, 13 Sim. 7; *Gillan* v. *Gillan*, 1 L. R. Ir. 114. And, as is pointed out by Mr. Justice GRAY in *Jackson* v. *Phillips*, 14 Allen 539, 580, a charity, being a trust in which the public is interested, and which is allowed by the law to be perpetual, "deserves and often requires the exercise of a larger discretion by the court of chancery than a mere private trust; for without a large discretionary power, in carrying out the general intent of the donor, to vary the details of administration, and even the mode of application, many charities would fail by change of circumstances," etc. Bearing these considerations in mind, and also that under the English practice, there would have been no difference in the execution of the trust, whether by the court or by the sign-manual, (*Moggridge* v. *Thackwell*, 7 Ves. 36,87,) we think that the court would find no insuperable difficulty in selecting the species, as well as the particular object of the charity.

If this be so, the objections remaining to the jurisdiction are purely historical; that it was not exercised in England, and therefore cannot be exercised here; that although in England there was a remedy existing alongside of the ordinary jurisdiction of the chancellor, and practically reaching similar results, yet, since this court has not the powers exercised by the sign-manual, a will must be defeated, and a trust must fail, which this court but for tradition is perfectly competent to carry into effect by machinery which it would have no hesitation in using were the case a hair's breadth different. If it is possible to avoid such a result, it is desirable to do so, and the historical tradition must be very clear, and the limit of jurisdiction very well defined, to make it necessary that this court should decline, for such arbitrary reasons to enforce a trust which it recognizes as valid. It might be hard to escape from the authorities, if no trust was interposed,

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Jackson v. *Phillips*, 14 Allen, 539, 576. And it is not to be denied that some courts of authority would probably require a specification of the charity, whether there was a trust or not, *Bristol* v. *Bristol*, 53 Conn. 242, 256, 5 Atl. Rep. 687; *Fclan* v. *Russell*, 4 Ir. Eq. 701, Longf. & Towns. 674; *Clifford* v. *Francis*, Freeman, 330; O'Leary, Religious and Charitable Uses, 183. On the other hand, in *Moggridge* v. *Thackwell*, 7 Ves. 36, although there were some words of recommendation in the will, not amounting, however, to a limitation of the generality of the trust, (7 Ves. 85, 86,) and although the circumstance that some objects were pointed out was adverted to in the discussion, Lord ELDON did sanction the opinion, that, if there is or ever has been a trustee, that is enough to warrant the court in framing a scheme, irrespesctive of the question whether the testator has pointed out any species of charity or not. In that case, Lord ELDON said that he doubted whether, if the decreè upon the principles attaching to charitable uses must have called upon the trustees, it could be said that, because the trustee is dead, the court is not to make a decree ordering such direction, for no such order could be given to the king executing by sign-manual. And, again, in *Paice* v. *Archbishop of Canterbury*, 14 Ves. 364, 372, he laid it down, generally, that, when the bequest is to trustees for charitable purposes, the disposition must be the subject of a scheme before the master; but that, when the object is charity without a trust interposed, it must be by sign-manual. See *Down* v. *Worrall*, 1 Myl. & K. 561, 563; *Reeve* v. *Attorney-General*, 3 Hare, 191, 197; *Cook* v. *Duckenfield*, 2 Atk. 562, 567, decree stated; *Moggridge* v. *Thackwell*, 7 Ves. 36, 83, 84; Boyle, Charities, 239. In the Anonymous case, Freem, ch. 261, "it was said, and not denied, that if a man deviseth a sum of money to such charitable uses, as he shall direct by a codicil to be annexed to his will, or by a note in writing, and afterwards leaves no direction, neither by note nor codicil, the Court of Chancery hath power to dispose of it to such charitable uses as the court shall think fit."

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Mills v. *Farmer*, 1 Meriv. 55, 59, 95. We do not propose to inquire very curiously whether Lord ELDON'S view in the latter case before him is historically accurate or not. It is a view which certainly goes no further than some of the earliest cases, and which it is necessary to adopt in this country to prevent a failure of justice. If we acted with less sanction, we should be conforming to the substantive principles of equity by framing an equitable remedy where we recognized an equitable right. We are of opinion that the above mentioned sum of $14,503.75 should be applied to charitable purposes, according to a scheme under the direction of the court.

Two other questions are raised by the report, and remain to be considered.

During his life the testator made certain deposits in the Massachusetts Hospital Life Insurance Company through William Sturgis. The Life Company issued policies, promising to pay Maria Gassett interest, "unless added to the principal sum as provided below;" and, after her death to pay the amount of the principal sum to Captain Percival, his executors or administrators. The provision in the policy referred to allowed Mrs. Gassett to have the annual "payments added to the principal sum (in order to increase said principal sum)," giving the company sixty day's notice. Interest was capitalized annually by the company on these policies, from their dates, in 1857 and 1852 through January 1, 1863, and the amount of the interest and the former capital added was indorsed on the policy under the head, "New Capital, being the principal sum, with the successive accumulations of interest." It is alleged, and admitted in the pleadings, that this was done at Mrs. Gassett's election, and in pursuance of the agreement in the policies. An express direction on her part was not proved, but it appears that Mrs. Gassett received interest on the new capital for over twenty years, until her death, and never objected to the additions or demanded the interest which had been capitalized. Captain Percival by his will stated that he

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had made provision for Mrs Gassett, and proceeded, "It is not my wish that any investment which I have made, or hereafter may make, for her, should be disturbed or changed by this will, but I direct that the sum shall remain and be disposed of according to the conditions thereof, in the same way as though this will had not been made, I advise," etc. Mrs. Gassett died in 1887. The plaintiff has collected the amount due on the policies, and the further questions raised are whether these amounts are to go to the next of kin, as if the will had not been made, or go to charity, as part of the residue; and also whether Mrs. Gassett's executor is entitled to a portion of the sums collected equal to the amount of interest added to the original capital, as we have described. On the former question it is argued that the testator meant, by the language which we have quoted, to withdraw the whole investment in the Hospital Life Company from the operation of his will. If that was not his intention, the clause has no effect, since, of course, Captain Percival could not disturb by his will Mrs. Gassett's vested life interest under the policies. But the words used apply to "any investment" which the testator may make in the future, as well as to those which he has made in the past, and they apply only to investments "for her," and to nothing else. We cannot limit their meaning to a specific reference to the investments, in the Hospital Life Company as a whole, nor extend it beyond Mrs. Gassett's interest, whatever it may turn out to be in this or that particular fund. We are constrained to hold that Captain Percival's interest in the policies is not excepted from the operation of his will, but is a part of the estate disposed of by it, and must be applied to charitable purposes. On the last question, as the pleadings stand, and apart from the pleadings in view of Mrs. Gassett's course of conduct while alive, we must assume that the additions of interest to capital were made with her consent, as recommended by Captain Percival in his will, and we must take the additions to have been made absolutely and for all pur-

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poses, so that her executor has no claim, but the principal fund as increased goes under the policies to the administrator of Captain Percival, to whom the company paid it. See *In re Curteis' Trusts*, L. R. 14 Eq. 217.

Decree accordingly.

See Goodale v. Mooney, 4 Am. Prob. Rep. 1; Hunt v. Fowler, 6 Am. Prob. Rep. 444, and monographic note. But as to charitable trusts void for indefiniteness, see Pritchard v. Thompson, 4 Am. Prob. Rep. 92.

UNDERWOOD *vs.* ROBBINS.

(117 Indiana, 308.)

CONSTRUCTION.—"LEGAL HEIRS."

The term "legal heirs" will be construed to mean "child or children," when it clearly appears from the will that the testator used it in that sense.

APPEAL from a judgment of the Circuit Court of Jay County. The opinion discloses the facts.

J. M. Haynes, for appellants.

J. W. Headington, J. J. M. La Follette & J. F. La Follette, for appellees.

COFFEY, J. Charles Sumption died testate in the year 1865, leaving a widow, Martha Sumption, and one child, Mary Alfaretta Sumption. By his will he bequeathed all his property to his widow, Martha, except $1,500, which he bequeathed to his said daughter in the following terms: "I give and bequeath to my daughter, Mary Alfaretta, the sum of $1,500 of my personal estate, to be, by my executor hereinafter named, put at interest, the principal of which to be paid to her when she shall arrive at the age of twenty-one years, or the day of her marriage, shall it please Almighty

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God to spare her to see either; but if she should die without legal heirs, or before she reaches twenty-one years, her share of my estate shall be given by my said executor to my mother, brothers and sisters, or their representatives, share and share alike." The widow, Martha, subsequently married Isaac Underwood, by whom she had two children, viz., Charles E. Underwood and Josephine Underwood, and then departed this life before the death of the said Mary Alfaretta Sumption. Mary Alfaretta Sumption departed this life before she arrived at the age of 21 years, unmarried and without issue. Isaac Underwood took letters of administration on her estate, and filed his final settlement with the Jay Circuit Court, reporting for distribution the sum of $1,086.93. The appellees, who are the nephews and nieces of the said Charles Sumption, deceased, filed a petition in the Jay Circuit Court, praying that said money be distributed among them, to the exclusion of the said Charles E. and Josephine Underwood, as the representatives of the brothers and sisters of the said Charles Sumption, deceased, the mother and the brothers and sisters having departed this life before the death of the said Mary Alfaretta. The court, upon proof of the facts alleged in said petition, granted the prayer of the petitioners, and ordered said fund distributed among them, to the exclusion of Charles E. and Josephine Underwood. Charles E. Underwood and Josephine Underwood appeal to this court, by their guardian, and urge that the order of the court below in excluding them in the distribution of said money was erroneous.

The question involved in the case depends upon the construction of the will of Charles Sumption. It is contended by the appellants that in the bequest to Mary Alfaretta Sumption, the term "without legal heirs," is used in its ordinary legal acceptation, while it is contended by the appellees that the term was used to signify "child or issue." The primary object in construing wills is to ascertain the intention of the testator. In doing this the words used in the will are to be

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given their ordinary legal meaning, unless it is clearly made to appear by the context that they were used in a different sense. The term "legal heirs" will be construed to mean "child or children," when it clearly appears from the will that the testator used it in that sense. *Jones* v. *Miller*, 13 Ind. 337; *Rusing* v. *Rusing*, 25 Ind. 63; *Rapp* v. *Matthias*, 35 Ind. 332; *Brown* v. *Harmon*, 73 Ind. 412; *Ridgeway* v. *Lamphear*, 99 Ind. 251; *Millett* v. *Ford*, 109 Ind. 159.

In the case of *Jones* v. *Miller*, supra, the bequest was: "To Samuel Stephen, my son, with the following exceptions, viz.: I give to Paulina Miller and Alexander Miller, the heirs of Nancy Miller, my daughter, one dollar each. * * * I further direct that if the aforesaid Samuel Stephen, my son, should decease without a lawful heir or heirs, that all that part of my estate both real and personal, set off for the said Samuel Stephen, shall be divided in equal shares between the aforesaid Paulina Miller and Alexander Miller." It was held that the term "*lawful* heirs," was used in its limited sense of child or heirs of the body of Samuel Stephen. The language used in the will now under consideration is not essentially different from the language of the will above set out. In construing this will we must not lose sight of the fact that Mary Alfaretta could not die "without lawful heirs," so long as the appellees in this case were living, if we use the term "lawful heirs" in its ordinary legal sense. To hold that the term "legal heirs" was used by the testator in this will in its ordinary legal sense, would be to hold that Charles Sumption was directing a division of his estate among parties who had departed this life before the death of his daughter, Alfaretta, for there could be no failure of legal heirs in that sense, as long as the nephews and nieces lived. We think that the term "legal heirs" in the will of Charles Sumption was used in its limited sense of "child or children."

Having reached that conclusion, we do not think the circuit court erred in distributing the money in the

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hands of the administrator among the appellees, to the exclusion of the appellants.

Judgment affirmed.

See Ballentine v. Wood, 5 Am. Prob. Rep. 244, 249; Kelley v. Vigas, 5 Am. Prob. Rep. 315; Allen v. Craft, 5 Am. Prob. Rep. 365; Millett v. Ford, 5 Am. Prob. Rep. 384; Huston v. Crook, 3 Am. Prob. Rep. 41; Stuart v. Stuart, 2 Am. Prob. Rep. 527.

STRATTON *vs.* PHYSIO-MEDICAL COLLEGE.

(149 Massachusetts, 505).

CHARITABLE USES.—BEQUEST TO NON-EXISTING CORPORATION. — CY PRES.

A testator bequeathed one-fourth of the income of the residue of his estate "to the trustees of the Physio-Medical College of Cincinnati, Ohio," intending the bequest for a medical school which never was incorporated and which had ceased to exist. *Held*, that the income could not be claimed by a different body called the Physio-Medical Institute, and that the trust could not be administered *cy pres*, the college intended by testator not being a public or charitable institution.

RESERVED from the Supreme Judicial Court of Suffolk County.

A. A. Ranney (*F. Ranney* with him), for the plaintiffs.

A. Fiske, (*J. Wilby* of Ohio with him) for Physio-Medical Institute.

H. C. Bliss, First Assistant Attorney-General, for the Attorney-General, submitted the case without argument.

HOLMES, J. This is a bill in equity, filed June 19, 1882, brought by the son and widow of John Stratton, who allege themselves to be his heirs at law, to obtain

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a decree that one-fourth of the income of the residue under such will, directed by him to be paid to the trustees of the Physio-Medical College of Cincinnati, Ohio, be paid to the plaintiffs on the ground that there is no such institution. The words of the will are, "one-quarter part of the net income is to be paid semi-annually to the trustees of the Physio-Medical College of Cincinnati, Ohio, to be used by the college for the promotion of the medical art, as believed in and favored by me during my lifetime, and in support of that institution, as the trustees thereof shall from time to time determine, the same to be paid to the treasurer of the institution duly authorized." The master reports, that the testator supposed that there was a corporation of the name used by him, of which one Curtis, at whose instance he gave the legacy, was president or director; that in fact there was no such corporation in existence at the testator's death, but that Curtis lectured and taught, alone or with others, under that name; and that Curtis's medical school was the one meant. This school ceased to exist at Curtis's death, in 1881. The income is claimed by a corporation called the Physio-Medical Institute, established at Cincinnati. Assuming that it would be possible for that corporation to take a gift to the Physio-Medical College (*Hinckley* v. *Thatcher*, 139 Mass. 477, 1 N. E. Rep. 840; *Tucker* v. *Seaman's Aid Society*, 7 Metc. 188, 209,) it could not do so in the absence of evidence appropriating to it a name which on its face denotes a different body. *Minot* v. *Boston Asylum and Farm School*, 7 Met. 416; *American Bible Society* v. *Pratt*, 9 Allen, 109. But the evidence has not that effect, and the master finds that the name in the will does not mean the Physio-Medical Institute.

We do not think that the claim of this defendant had sufficient ground to warrant the allowance of its costs out of the fund.

The plaintiff has argued that the income should not be applied *cy pres*. The Attorney-General, who has been made a party defendant, makes no argument that it should be so applied. The attempt of the Physio-

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Medical Institute to raise the question by an amendment to its answer was disallowed, and it did not seek to reopen the matter at the hearing before us. In the absence of argument, we see no sufficient reason for directing a scheme to be framed.

In the first place, it does not appear that the will creates a public charity. It does not purport to found an institution, as in *Tainter* v. *Clark*, 5 Allen, 66; *Attorney-General* v. *Lonsdale*, 1 Sim. 105 *Russell* v. *Allen*, 107 U. S. 163, 2 Sup. Ct. Rep. 327, but to give the fund to one already in existence, and having a determinate character. It would seem that neither Curtis's medical school in fact, nor the supposed corporation in the mind of the testator, was a free or public school, as in *Boxford Religious Society* v. *Harriman*, 125 Mass. 321, and *Morville* v. *Fowle*, 144 Mass. 109, 10 N. E. Rep. 766, (see *McIntire* v. *Zanesville*, 17 Ohio St. 352;) but that they were both private pecuniary enterprises, to the support of which the trustees, that is to say the party interested, had power to apply the whole income. Such an enterprise is not a public charity,even if indirectly it serves charitable ends. *Attorney-General* v. *Hewer*, 2 Vern. 387; *Attorney-General* v. *Newcomb*, 14 Ves. 1, 7; *Attorney-General* v. *Haberdashers' Co.*, 1 Myle. & K. 420. See *Drury* v. *Natick*, 10 Allen, 169, 180; *Carne* v. *Long*, 2 DeG., F. & J. 75, 79; *Thompson* v. *Shakespear*, 1 De G. F. & J. 399, 406, 408. If the will allow the fund to be applied to purposes not charitable, the gift fails as a charity. *Rotch* v. *Emerson*, 105 Mass. 431, 433; *Saltonstall* v. *Sanders*, 11 Allen, 446, 464; *Morice* v. *Bishop of Durham*, 9 Ves. 399, 406; *Ellis* v. *Selby*, 1 Myl. & Cr. 286, 299.

In the next place, we think that it appears from the facts that the gift is primarily to the trustees of the college, and that the college is in another State, that the income is to be used by the college, and that the whole of it may be used for its own support, in the discretion of the trustees, as well from the circumstances under which the will was made, that the main object is the support of the particular institution which the

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testator had in mind, and that the promotion in Ohio of Thompsonianism, the form of medical art believed in by the testator, was to be accomplished as incident to that object. It is immaterial to this conclusion whether the name described an existing beneficiary or not. At least, it described an institution which was supposed by the testator to exist, and of which his friend was supposed to be an officer. The testator's belief as to the facts has the same effect upon the construction of his language whether his belief was right or mistaken. Then, if the foregoing construction of the will is not too strict, even if the gift were to a public charity, probably the gift would fail upon the failure of the donee. The main doubt, if it were conceded that the gift was charitable, would arise on the question of construction. In such cases courts have gone very far in discovering and sustaining a general charitable intent distinct from the means indicated for carrying it out, or the immediate object. *Incorporated Society* v. *Price*, Jones & Lat. 498, 7 Ir. Eq. 260, and other cases cited in *Jackson* v. *Phillips*, 14 Allen, 539. Thus in case of a simple gift to an institution, if the institution is in its nature, and by its name appears to be a mere trustee or conduit for the application of its funds to charitable purposes, the gift will not fail upon failure of the donee. *Winslow* v. *Cummings*, 3 Cush. 358; *Bliss* v. *American Bible Society*, 2 Allen, 334; *Old South Society* v. *Crocker*, 119 Mass. 1, 24. See *In re Maguire*, L. R. 9 Eq. 632. So, *a fortiori*, if the objects of the charitable trust are declared by the will, and it appears that the discretion of the particular societies named is not of the essence of the gift. *Reeve* v. *Attorney-General*, 3 Hare, 191, 197; *Marsh* v. *Attorney-General*, 2 J. & H. 61. But if the construction of the will is settled in the sense in which we have construed the one before us, then, if the donee fails, the gift fails. To that extent, at least, we may follow the late English cases with safety, and without encountering the doubts expressed in *Jackson* v. *Phillips*, 14 Allen, 539, 594, and 1 Jarm. Wills (Bigelow's ed.) 247, 248;

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Clark v. *Taylor*, 1 Drewry, 642; *Russell* v. *Kellett*, 3 Sm. & G. 264; *Marsh* v. *Means*, 5 W. R. 815, s. c. 3 Jur. (N. S.) 790; *Langford* v. *Gowland*, 3 Giff. 617; *Fisk* v. *Attorney-General*, L. R. 4 Eq. 521; *In re Maguire*, L. R. 9 Eq. 632; *Minot* v. *Baker*, 147 Mass. 348-350, 17 N. E. Rep. 839. See *Cherry* v. *Mott*, 1 Myl. & Cr. 123, 133; *Smith* v. *Oliver*, 11 Beav. 481; *Coldwell* v. *Holme*, 18 Jur. 396, 397; Tudor Charities (2d ed.), 225 *et seq.* And even if the donee is in existence at the date of the will, there is no absolute rule of law that prevents the charity terminating when the donee ceases to exist, although, no doubt, in such cases courts have gone still further in straining the meaning of wills, in order to uphold the supposed general intent. *Clark* v. *Taylor*, 1 Drewry, 642; *Russell* v. *Kellett, Son & G.* 264. See *Easterbrooks* v. *Tillinghast*, 5 Gray, 17; *Baker* v. *Clarke Institution*, 110 Mass. 88, 91. The favor shown to charities should not be carried to the point of overriding the plainly expressed limits of a gift, whether the duration is limited in so many words or not.

As the fund in question is a part of the residue, it goes to the heirs at law and next of kin of the testator, as undevised property. *Sohier* v. *Inches*, 12 Gray, 385; *Lombard* v. *Boyden*, 5 Allen, 249; *Smith* v. *Haynes*, 111 Mass. 346; *Cummings* v. *Bramhall*, 120 Mass. 552, 558; *Skrymsher* v. *Northcote*, 1 Swanst. 566, 570; *Humble* v. *Shore*, 7 Hare, 247, 249.

Decree for plaintiffs.

See Hunt v. Fowler, 6 Am. Prob. Rep. 444 and note on "Charitable Trusts," also Cruikshank v. The Home for the Friendless, 6 Am. Prob. Rep. 490, and note on "Bequests to Non-Existing Bodies," and cross-reference note. As to the doctrine of *cy pres*, see Kinney v. Kinney, 6 Am. Prob. Rep. 153, and the cross-reference note; Holland v. Alcock, 6 Am. Prob. Rep. 188; and Doughten v. Vandever, 6 Am. Prob. Rep. 392, and the cross-references.

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HAGEMAN *vs.* HAGEMAN.

(129 Illinois, 164.)

THE RULE IN SHELLEY'S CASE.

When a devise is to heirs generally, no particular person or class of persons being designated as remainder-men, the rule in Shelley's Case applies and is held to conclusively express the intention of the testator, notwithstanding the expression of an intention that the ancestor shall take a less estate than the fee.

APPEAL from a decree of the Circuit Court of Cook County. The opinion discloses the facts.

Charles D. Clark, for appellants.

E. H. & N. E. Gary, for appellees.

SHOPE, J. This was a bill filed in the circuit court of Cook county by Frederick C., George W., Franklin J., and Louis B. Hageman, against the minor children of each, respectively, for partition of certain lots in what is known as McGrath's addition to Chicago, and praying a construction of the last will and testament of Frederick C. Hageman, deceased, father of the complainants. It is alleged that by said will the property sought to be partitioned was devised to the complainants in fee. A guardian *ad litem* was appointed for the defendants, who answered, admitting the making of said will, the death of the testator, and the admission of the will to probate, but denying that the complainants were the owners of the real estate devised, in fee; and averring that by the terms of the will the defendants, children of complainants, became owners of the title in fee to the lands in controversy, subject only to a life estate in complainants, and the further possibility of letting in such other children of complainants as might thereafter be born, etc. Upon the hearing the court construed the will as vesting the fee-simple title in the complainants, and ordering partition thereof accordingly.

The third clause of the will of Frederick C. Hageman

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deceased, and which is the only portion of the will involved in this controversy, is as follows: "I give and devise unto my sons, Frederick C. Hageman, George W. Hageman, Franklin J. Hageman, and Louis B. Hageman, lots ten, eleven, thirteen, fourteen, and fifteen, as subdivided by plat 'A,' in block one, in McGrath's addition to Chicago, Illinois; but the said Frederick C. Hageman, George W. Hageman, Franklin J. Hageman, and Louis B. Hageman shall neither of them sell or mortgage any of the lots last above mentioned, but the same shall go to their heirs after them,—that is to say, the lots which they take,— which shall be determined by lot or agreement between themselves."

The question presented is whether under this language of the will, the complainants, sons of the testator, took an estate for life in the lots devised, or took the estate in fee. It is contended that the language of the testator, that they "shall neither of them sell or mortgage any of the lots" devised, "but the same shall go to their heirs after them," operates as a limitation upon the devise to the sons, so that they took a life-estate only, and their children in *esse* became the owners in fee, subject to such life-estate and the possibility of letting in other children of the said sons of the testator thereafter born, and answering the same description. The language employed in the first part of this clause of the will is sufficiently comprehensive to create an estate in fee in the sons. It is to be observed, that in the words following there is nothing which designates any particular person, or class of persons, as remaindermen. The devise is to the sons, and to their heirs after them. It is urged, however, that it was manifestly the intention of the testator to deprive his sons of the power of alienation, and to vest in them an estate for their lives, only, and that the intention of the testator, as thus evinced, must control, and that the rule in Shelly's case, having the effect of defeating the intention of the testator, as thus shown, cannot be applied. It is said by Kent, (4 Com. p. 233,) in commenting upon the decision in *Perrin* v. *Blake*, 4 Burr. 2579: "The re-

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sult of that famous controversy tended to confirm, by the weight of judicial authority at Westminster Hall, the irresistible pre-eminence of the rule; so that even the testator's manifest intent could not control the legal operation of the word 'heirs,' when standing for the ordinary line of succession as a word of limitation, and render it a word of purchase. If the term 'heirs,' as used in the instrument, comprehended the whole class of heirs, and they became entitled, on the death of the ancestor, to the estate, in the same manner and to the same extent, and with the same descendible qualities, as if the grant or devise had been simply to A and his heirs, then the word 'heirs' is a word of limitation, and the intention will not control the legal effect of the word." This doctrine has received repeated recognition by this and other courts where the rule in *Shelly's case* is in force, so that we do not deem a review of the authorities necessary. See *Baker* v. *Scott*, 62 Ill. 88; *Wicker* v. *Ray*, 118 Ill. 472, *Ryan* v. *Allen*, 120 Ill. 648. 12 N. E. Rep. 65; *Van Olinder* v. *Carpenter*, 127 Ill. 42. In the case last cited, the authorities are collated and reviewed. Mr. Preston, in his work on Estates, (Vol. 1, pp. 281-283,) speaking of the legal effect under the rule in Shelly's case of the word "heirs," where it is used as designating persons who would take in succession, says: "In wills, the rule applies generally, and without exception, to the several limitations, as often as the gift to the heirs is without any expression of qualification," and that "neither the express declaration,—first, that the ancestor shall have an estate for his life, and no longer; nor, secondly, that he shall have only an estate for life in the premises, and that after his decease it shall go to the heirs of his body, and in default of such heirs vest in the person next in remainder, and that the ancestor shall have no power to defeat the intention of the testator; nor, thirdly, that the ancestor shall be tenant for his life, and no longer, and that it shall not be in his power to sell, dispose, or make way with any part of the premises, * * * will change the word 'heirs' into a word of purchase."

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The rule in *Shelly's case* is a rule of property in this State. (*Baker* v. *Scott, supra*; *Ryan* v. *Allen, supra.*) And its application to the particular case depends, not upon the quantity of estate intended to be given to the ancestor, but upon the estate devised to the heir. When the devise is to heirs generally, the rule applies, and is held to conclusively express the intention of the testator, and will necessarily govern and control in determining the estate devised, notwithstanding the expression of an intention on the part of the testator that the ancestor shall take a less estate than the fee. The devise, here, must therefore be treated as if it were to the sons of the testator and their heirs, without qualification, in which event it is clear the sons would take the fee in the estate devised. See *Van Olinder* v. *Carpenter, supra.* The decree of the circuit court, being in conformity with the views here expressed, must be affirmed.

The rule in Shelly's case.—The result of the authorities is well stated by Mr. Justice Elliott, speaking for the Supreme Court of Indiana, in Allen v. Croft, (109 Ind. 476) as follows: "It has seemed to many that there is a conflict between the rule declaring that the intention of the testator must govern and rule in Shelly's Case; but the appearance of conflict fades away when it is brought clearly to mind that when the word 'heirs' is used as a word of limitation, it is treated as conclusively expressing the intention of the testator. Where it appears that the word was so used, the law inexorably fixes the force and meaning of the instrument. If once it is granted that the word was used in its strict legal sense, nothing can avert the operation of the rule in Shelly's Case; so the inquiry is, was the word used as one of limitation? The only method in which an instrument employing the word 'heirs' can be shown not to be within the rule, is by showing that the word was not employed in its strict legal sense." This may be done by showing "that the words 'heirs' or 'heirs of body' were used as synonymous with 'child' or 'children,' or some other limited class, and not as meaning those who take by inheritance, generally, as heirs, in the technical sense of the word." Carpenter v. Van Olinder, 127 Ill. 42, 50, citing Millett v. Ford, 109 Ind. 159, where "heirs of his body in lawful wedlock" was construed as though the devise had been to the devisee and his children; and Urich's Appeal, 86 Pa. St. 386 where from other parts of the will it was shown that testator used "heirs" and "children" synonymously.

Another class of cases embraces those that restrict and narrow the meaning of the word "heirs" to particular persons, or to a particular

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class of persons less than that of heirs in general, as in Belslay v. Engler, 107 Ill. 182, where the word was restricted to children of testator's grandchildren, when the word becomes one of purchase instead of inheritance.

See further, Leathers v. Gray, 6 Am. Prob. Rep. 72, and the cross-references; Hughes v. Nicklas, *infra*.

TODD *vs.* SAWYER.

(147 Massachusetts, 570.)

LIFE ESTATE WITH POWER OF APPOINTMENT.— RESTRAINT OF ALIENATION.

A devise of property to testator's daughter, "to be kept and retained by her as long as she shall live, and be disposed of as to her seems proper at her decease," being a life estate with absolute power of appointment of the fee, confers on the devisee such an interest as enables her to convey the fee by deed in her lifetime; for if testator intended to prohibit an alienation during her life, the provision is void, there being no devise over.

APPEAL from a judgment of the Superior Court of Suffolk County. This was an action by Charlotte Todd against Charles W. Sawyer to recover damages for a breach of an agreement to purchase a certain lot of land which plaintiff held under the following clause in the will of her father Robert Todd, to wit: "After the payment of the sums above named, I hereby give and bequeath to my beloved daughter Charlotte Todd [the property described] to her own and separate use, to be kept and retained by her as long as she shall live, and be disposed of as to her seems proper at her decease." The plaintiff tendered defendant a deed conveying her interest in the property "in execution of the power given in and by the will of the late Robert Todd," which defendant refused on the ground that it did not convey a fee simple in the premises. The Superior Court gave judgment for the defendant and plaintiff appeals.

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H. W. Bragg, for the plaintiff.

R. Bradford, for the defendant.

C. Allen, J. At the outset, it is apparent that the plaintiff has at least a life estate. The words, "to be kept and retained by her as long as she shall live," were probably not intended to prohibit an alienation during her life, but were rather expressive of the testator's expectation or wish. But if intended as a prohibition, no legal effect can be given to them; a provision against alienation being void. *Blackstone Bank* v. *Davis*, 21 Pick, 42; *Gleason* v. *Fayerweather*, 4 Gray, 348, 351. The words, "be disposed of as to her seems proper at her decease," imply a power of disposition either by will or by deed. *Kimball* v. *Sullivan*, 113 Mass. 345; *Tomlinson* v. *Dighton*, 1 P. Wms. 149. There was no devise over. Taking the plaintiff's title, therefore, at the lowest, she has a life-estate, with a full power of disposition by deed; and this enables her to convey a good title in fee. And indeed there seems to be no good reason for considering her own title as any less than a fee, especially in view of the provisions of Gen. Sts c. 92, § 5, "that every devise of land . . shall be construed to convey all the estate of the devisor therein which he could lawfully devise, unless it clearly appears by the will that the devisor intended to convey a less estate." *Cummings* v. *Shaw*, 108 Mass. 159; *Lyon* v. *Marsh*, 116 Mass. 232; *Bowen* v. *Dean*, 110 Mass. 438; *Hale* v. *Marh*, 100 Mass. 468; *Whitcomb* v. *Taylor*, 122 Mass. 243, 248; *Gibbins* v. *Shepard*, 125 Mass. 541, 543; *Kelley* v. *Meins*, 135 Mass. 231. According to the agreement, judgment must be entered for the plaintiff for $300.

Judgment for the plaintiff.

As to life estates with power of appointment, see Walker v. Pritchard, 6 Am. Prob. Rep. 381, and the cross-reference note. As to restrictions upon alienation, see Smith v. Towers, 6 Am. Prob. Rep. 589, and the cross-references; also Holland v. Alcock, 6 Am. Prob. Rep. 188, and monographic note, p. 210. And as to perpetuities, see Cruikshank v. The Home for the Friendless, 6 Am. Prob. Rep. 490, and the cross-references.

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PECKHAM *vs.* LEGO.

(57 Connecticut, 553.)

LIFE ESTATES AND REMAINDERS.—DISCRETION TO USE PRINCIPAL.

A bequest of the "use and improvements" of an estate during the natural lives of the legatees, is not rendered absolute by a discretion to use a portion of the principal should it be necessary for their personal comfort, "saving as much as possible for the children born to them"; and by implication the children of the legatees take a vested interest in the remainder under the will.

RESERVED from the Superior Court of New Haven County. The facts appear in the opinion.

G. P. Ingersoll, for the heirs at law.

S. A. York, for Grace A. Peckham, one of the defendants.

LOOMIS, J. This suit was brought to obtain a judicial construction of the last will of Mary Yemmans, which is as follows: "1. I give and bequeath to my brother, John Lego, five hundred dollars. 2. I give and bequeath to W. Frank and his wife, Grace A. Peckham, the use and improvement of the whole of the remainder of the estate of which I may die possessed, both real and personal, during their natural lives. Should it be necessary for their personal comfort to use any portion of said property, it is my will that they do so, exercising good judgment, and saving as much of it as possible for the children born to them. 3. I appoint W. Frank and Grace A. Peckham executors of this my last will and testament."

The following facts are found by the court: The heirs at law in this case are John Lego, a brother of the testatrix, and the children of deceased brothers and sisters. Grace A. Peckham, one of the defendants, is a niece of the testatrix, and lived with and was brought up by her as a member of her family. After the marriage of W. Frank Peckham with said Grace, she and

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her husband and the testatrix lived together, with occasional intermissions, until the death of the testatrix. About the time of the execution of the will the testatrix went to live with Mr. Peckham and his wife, and continued to reside with them to the time of her death. The other heirs at law, though not intimate, were on friendly terms with the testatrix. The property and estate of the testatrix came to her by the will of her late husband, Joseph Yemmans. A few days after the death of her husband, the testatrix made and executed the will, it having been drawn by Rev. E. E. Beardsley, of New Haven. The first question is, whether, under the second section of the will, Mr. and Mrs. Peckham take a fee or a life-estate. The intention of the testatrix, which is to control, must here be ascertained from the language employed by her in making the gift. In the first section she employed direct and fitting words in making an absolute gift to her brother, and had she intended a similar gift of the residue to the Peckhams, similar language most naturally would have been employed, being already in her mind. Instead of that, however, we find language of a contrary import: language which is irreconcilable with the idea that she intended to give other than a life-estate.

The language is doubly restrictive. In the first place the bequest is guarded by the words "use and improvement," which alone would distinguish the gift from a fee, but, to put it beyond all controversy, the tenure of the holding is expressly given as "during their natural lives." If the section stopped here, it is conceded that a doubt as to the meaning would be impossible; but the words which follow: "Should it be necessary for their personal comfort to use any portion of said property, it is my will that they do so, exercising good judgment, and saving as much as possible for the children born to them," it is contended remove the restriction twice applied in the preceding language, and enlarge what was plainly only a life-estate, and convert it into a fee. We fail to discover any such intention. The language necessarily implies a consciousness on the part of the

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testatrix that she had given only a life-estate; but it occurs to her that the income may be so limited, and their circumstances so reduced, that they may lack the means of comfortable support and she adds the clause under consideration to meet such an emergency, but this clause was never intended to sweep away the life-estate. It was only to be called into play by an emergency—by the *needs* of her beneficiaries. The right to resort to the principal was founded on necessity and restricted by necessity. The words are "should it be necessary." If it should not be necessary it is all a mere life estate; if it is, then the restriction is that all, except the necessary portion so taken remains a mere life-estate. It is said that the words "necessary for their personal comfort," are indefinite in meaning, and practically unrestricted, and therefore inconsistent with any remaining life-estate. We cannot accept this view. One of the definitions of "comfort" given in Webster's Dictionary, as applied particularly in law, as well as in some other things, is "support." The language therefore must be held to mean "necessary for their support."

But it is said that it is again rendered indefinite by being all left to the judgment and discretion of the legatees as to the kind and extent of the support needed; that they may use the principal to gratify their mere whims and fancies. We do not think any such authority is given. For the time being they exercise their judgment, but are not the ultimate judges of what is necessary, but the Superior Court, as a court of equity, and perhaps in some cases the probate court, will review and revise their judgment, and determine whether the exigency had arisen to give them any right to resort to the principal, and if so, whether they have exceeded the liberty given them. But our attention has been called particularly to the concluding words enjoining the exercise of good judgment on their part. We do not think the question of necessity is to be so determined. But the good judgment enjoined is to be exercised in saving as much as possible for the children

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within the field given of what is necessary. What is necessary in law does not always, nor often, mean a strict, absolute necessity. It is a relative term, and variable according to circumstances. It means here, as in the case of the obligation of a husband to furnish necessaries for his wife, what is needed in reference to the situation and condition in life, and within those limits which may be saved by the exercise of good judgment. If they act within the legal limits of a necessity in law they may not be responsible, but are if they appropriate a portion of the principal when not needed for their support. If now we have discovered the intention of the testatrix as evidenced by the language of her will, a reference to artificial rules of interpretation would seem unnecessary, but as some of these rules were referred to in the discussion of this case as being opposed to the construction we have adopted, a brief discussion of the matter may seem desirable. *Hull* v. *Culver*, 34 Conn. 404, was referred to as indorsing the principle that "where an estate for life is given, with power in the devisee to sell and dispose of it at his own discretion and for his own use, he takes a fee." In *Lewis* v. *Palmer*, 46 Conn. 458, CARPENTER, J., in giving the opinion of this court, very properly calls attention to the fact that the above proposition was stated as one which the counsel on both sides conceded, and that the court, without discussing it, immediately passed to the consideration of another question regarded as controlling, namely, whether the power of sale as there given was absolute or contingent. The language to be interpreted was as follows: "I give all my estate to my beloved husband, Ransom Culver, to use and improve during his natural life, and if he should want for his support to sell any part or the whole of it for his maintenance, my will is that it shall be at his disposal." In construing this language the court said: "The great object is of course to ascertain the intention of the devisor. If she had designed to give her husband the entire estate, it would have been very easy and very natural for her to say it

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in short and direct terms, or to place the disposal of it at his discretion, without imposing a condition. But she gives him the disposal only 'if he should want for his support to sell any part or the whole of it for his maintenance.' This language very clearly implies a limitation or restriction of the power to a case of necessity. The sale is to be proportioned to the extent of the necessity." It will be seen that the court construed the authority to sell substantially as we do in the present case. So that, even if the proposition referred to is a sound one, it would not apply to this case any more than to that one. But the proposition has been materially modified by the later utterances and decisions of this court. In *Lewis* v. *Palmer*, *supra*, the words of the will were: "I do give and devise unto my said sister, Sarah Palmer, the use of all the rest of my real estate that I may have or leave at my death, during her natural life, and for her to dispose of as she may think proper, right or just." Here was plainly an unrestricted power of disposal at discretion, and yet the court did not hold that the legatee took a fee. The question, it is true, was left open, as the case could be disposed of upon another ground, yet the discussion plainly showed that the court was prepared to hold that a life-estate created by express words would not be enlarged to a fee by the power of sale. Afterwards, in *Glover* v. *Stillson*, 56 Conn. 316, 15 Atl. Rep. 752, the court was called upon to construe a will where the words were: "I give the residue of my estate, both real and personal, unto my sisters Polly A. Stillson and Mary B. Stillson, for the term of their natural lives; hereby empowering my said sisters to dispose of any portion of my estate, either real or personal, if they should so desire." The court held that the sisters took only a life estate, notwithstanding their unrestricted power of disposal, and in giving the opinion of the court, CARPENTER, J., said: "We are asked to say that the power of sale enlarges an express life estate to a fee. If we do so, what becomes of the intention of the testator? His intention to give pecuniary legacies

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to the parties named, and the residue to the orphan asylum, is just as certain, and, we may add, just as provident, as the intention to provide for his sisters; and that intention by the construction contended for is wholly defeated. The power of sale may, in doubtful cases, aid in ascertaining the intention; but to give it an artificial and technical force and thereby defeat the manifest intention of the testator, is wholly inadmissible." These utterances we think are in accord with the decided preponderance of judicial authority in the United States. Chancellor KENT, in volume 4, side p. 536, 7th Ed., of his Commentaries, summarizes the settled doctrine as follows: "If an estate be given to a person generally, or indefinitely, with a power of disposition, it carries a fee; unless the testator gives to the first taker an estate for life only, and annexes to it a power of disposition of the reversion. In that case the express limitation for life will control the operation of the power, and prevent it from enlarging the estate to a fee."

It remains for us to consider a still more difficult question in regard to the disposition of the reversion —whether it belongs to all the heirs of the testatrix as intestate property, or whether the will takes hold of it and sufficiently designates the persons who are to take. The language of the will is so unusual and so doubtful that, at the outset, we feel embarrassed by two independent principles of law operating in different directions at the same time. One requires the court to avoid if possible any construction which would result in partial intestacy. *State* v. *Smith*, 52 Conn. 563. *Warner* v. *Willard*, 54 Conn. 472, 9 Atl. Rep. 136. The other cautions us not to disinherit the heirs at law unless on so strong a probability that an intention to the contrary cannot reasonably be supposed. Wigram on Wills, 167; *Wilkinson* v. *Adam*, 1 Ves. & B. 456. The residuary estate, it is conceded, is not expressly disposed of by the terms of the will, but there are words evincing, we think, an intention and desire on the part of the testator as to the disposition. We refer to the

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closing words of section second. The testatrix, having in mind the life estate she has given, adds a conditional and restricted permission to use a portion of the principal or residuary estate, but in that connection enjoins the life-tenants, in availing themselves of the permission, "to use good judgment, saving as much as possible for the children born to them." This implies that the children of the life-tenants are to take the remainder,—all of it.

But does it imply that they are to take it under the will, or simply as her heirs at law? Her heirs are numerous, the record gives the names of eight besides the Peckhams, and the portion which the latter could inherit by right of representation would be insignificant, as compared with the whole. If she referred at all to her own heirs, she would have so stated, and would not have restricted the benefit of the saving to the children born to them, the Peckhams. We do not think the language can be satisfied at all with any such reference as suggested, but that the words imply that the Peckham children are to take the remainder under the will, and not because they may become her heirs at law with many others. The question of implied gifts is in every case one of intention. There are several instances where a devise by implication has received the sanction of this court. We will mention only two.

The first is the case of *Minor* v. *Ferris* and others 22 Conn. 371. A testator, after devising his real estate for the benefit of his wife and directing his executor to sell it within one year and to invest the proceeds in some safe property to remain a fund for her support during life, gave to his sister, if living at the decease of his wife, and if not to her children, whatever of the property might be left. He then bequeathed to his sister, in general and unrestricted terms, all his personal estate. In a subsequent clause he authorized his executors, if they deemed it advisable, to extend the time of selling the real estate for 18 months, and expressed his opinion that, if the property was well sold and invested, the interest would support his wife,

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then he repeated his bequest to his sister, or if deceased, to her children, of all his personal property; adding, "if my wife has sufficient to support her." Counsel for the sister contended that the last clause must either be rejected as without meaning, or, as explained by the context, it must be construed to mean "as my wife has sufficient to support her," the testator having just expressed an opinion to that effect; but the court did not accept this view, but upon the ground of a prevailing intention apparent on the face of the will to provide for his wife ample support during life, and that the last clause was a qualification of preceding bequests, held that all the personal property was by implication given for the benefit of the wife during her life, upon the same terms as those upon which the real estate had been devised. The other case is that of *Holbrook* v. *Bentley*, 32 Conn. 502, where a testator bequeathed to his wife the use of three thousand dollars, and also gave her absolutely all his household furniture with a few exceptions mentioned, and then added a clause in this form:—"What follows is after the death of my executrix," (his wife). "I do will and bequeath all the remainder of my estate indiscriminately, be it money or household furniture, equally to all my grandchildren." There was thus left a considerable amount of personal property not expressly disposed of during the life of the widow, and which would, if regarded as falling into the residuum, be left in the hands of the executrix to accumulate for the grandchildren. It was held, as this intention was improbable, and there were no words to indicate it, and no provision that the executrix should hold the property as trustee for the grandchildren, that the will should be construed as giving by implication to the widow the use of this property for life. Here it will be seen there were no express words at all indicating a desire that the widow should have this property, and all her express bequests were precisely defined. It seems to us that in the present case there is at least

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as good a foundation in the will for the implication of a devise, as in the cases cited.

Many similar illustrations of implied gifts might be cited from other jurisdictions, but we will refer to two cases only.

In *Edens* v. *Williams*, 3 Murph., 37, there was a gift of certain property to the testator's wife, and, if she should prove *enciente*, such child should be supported and educated out of the income of the property so left her, "as well as all the property I may die possessed of," with a residuary bequest to nieces. The court held that the whole estate was given by implication to the wife and child on its birth. In *Piper's Estate*, 33 Leg. Inst. 228, a direction that the mansion house should not be sold during the daughter's life, but that she might reside in it, was held to give a life-estate. The Superior Court is advised that, under the will of Mary Yemmans, W. Frank Peckham and his wife Grace take a life-estate in the remainder, with the privilege of disposing of or using any portion of the principal to the extent needed for their support and maintenance in a manner suited to their condition and circumstances in life; and that the children born to them take a vested interest in the remainder.

In this opinion the other judges concurred.

As to life estates and remainders, see Davies v. Davies, 6 Am. Prob. Rep. 361, and the cross-reference note; Walker v. Pritchard, 6 Am. Prob. Rep. 381, and the cross-references; Hull v. Holloway, 7 Am. Prob. Rep. 75 *infra;* Chase v. Cartwright, 7 Am. Prob. Rep. 83 *infra;* Todd v. Sawyer, 7 Am. Prob. Rep. 64 *supra*, and Siddons v. Cockrell 7 Am. Prob. Rep. 31, *supra*, and the cross-references.

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HULL *vs.* HOLLOWAY.

(58 Connecticut, 210.)

LIFE ESTATES AND REMAINDERS.—USE OF INCOME AND PRINCIPAL.—DISCRETION OF TRUSTEE.

A will creating a trust for the benefit of the husband, son and grandchildren of the testatrix, the trustee to pay the husband from time to time, upon his written request, so much of the income and principal as he "may require for his own personal use," construed, *ex visceribus testamenti*, as intending that so long as the husband is able to support himself by his own exertions, or has property available for his support, the trustee shall not pay him any portion of the income or principal of the fund.

APPEAL from a judgment of the Superior Court of New London County. The facts are disclosed in the opinion.

H. A. Hull, for plaintiff.

R. Wheeler, for the defendant G. E. Holloway.

A. Brandegee, for the defendants G. E Holloway, Jr., and Vera G. Holloway.

J. M. HALL, J. This action is brought by the trustee under the will of Mary E. Holloway, deceased, to obtain for his guidance a construction of certain clauses of the will. The part of the will giving rise to the questions in the case is as follows: "All the real estate of which I die possessed, and all my personal property, except such as is hereinafter named and specially bequeathed, I give, devise and bequeath to Patrick H. Hutchinson, of the city of Boston, within the county of Suffolk and Commonwealth of Massachusetts, in trust for the following uses and purposes, namely; to be by him held, managed, invested, reinvested, and expended for the benefit, maintenance and support of my husband, Gideon E. Holloway, during his life, and, after his death, for the benefit, maintenance and support of my son, Gideon E. Holloway, Junior, and of any child

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or children of my said son which may be born hereafter, as the fruit of any marriage by him hereafter contracted. This trust is to continue during the lives of my said husband and my said son, and during the life and minority of any of my said son's children, born as aforesaid. I hereby give said trustee full power and authority to mortgage, sell, and convey any and all of my said real estate, whenever in his judgment it shall be for the advantage of the beneficiaries under this trust; but he may so mortgage or sell said real estate during the lifetime of my said husband only with his written consent. I direct that said trustee shall from time to time pay and transfer and convey to my said husband, for his use and benefit, so much of the income and principal of the above named property as my said husband may require for his own personal use, the same to be paid, transferred and conveyed to my said husband upon his written request. I direct that no part of said trust fund shall be used to pay any existing or future indebtedness of my said husband or of my said son, neither shall said trust fund be liable in any way for any debts of my said husband or son now outstanding, if any, or for any that hereafter may be contracted by either of them. "And it is my will that, after the death of my said husband, the income of property then remaining in the hands of said trustee and belonging to said trust funds, or so much of said income as said trustee may deem necessary, shall be expended by him for the benefit, maintenance and support of my said son, and of his child or children of any marriage to be by him hereafter contracted, if any. Any portion of said income not so expended may, at the discretion of said trustee, be added to the principal of said fund, or be reserved to meet any extraordinary requirements of those for whose benefit said trust is created. I direct that upon the termination of said trust by the death of my husband and son, and the death or majority of my son's child or children as aforesaid, the property held under the provisions of said trust be divided among my heirs at law according

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to the statutes of the State of Connecticut for the distribution of intestate property, excluding therefrom the issue of my son's first marriage." The property covered by the trust is a piece of real estate situated in the city of New London, and subject to a mortgage. The beneficiaries under the trust are Gideon E. Holloway, husband of the testatrix, Gideon E. Holloway, Jr., her son, and Vera G. Holloway, her grandaughter. The trustee in his complaint propounds the following questions: 1st. What authority said trustee has to sell said real estate, and under what restrictions he must act? 2d. What money or proceeds of said sale said trustee can lawfully pay to said Gideon E. Holloway under said will? 3d. Whether said Gideon E. Holloway has the unqualified right to demand of said trustee a sale, and the payment to him of the whole or any part of the proceeds of said sale, or a conveyance of said real estate to him. 4th. Whether said trustee is to exercise his personal discretion as to the needs and requirements of said Gideon E. Holloway, and in paying money to said Holloway on his request under said will. 5th. What money or proceeds of sale of said land said trustee can pay to said Gideon E. Holloway, Jr., under said will, and what rights he has to said money or proceeds during the life of his father? 6th. What money or proceeds of sale of said land said trustee can pay to said Vera G. Holloway, and what rights she has to said money or proceeds during the lives of her father and grandfather? 7th. Whether said trustee is authorized or directed to transfer said real estate or the proceeds to said Gideon E. Holloway upon his simple request in writing, or whether said trustee shall first be satisfied in the exercise of his own discretion that said Holloway actually requires the same for his necessary uses and personal maintenance and support.

All parties in interest agree that it is for the advantage of the beneficiaries that the property be sold, and Gideon E. Holloway having consented in writing to the sale, it becomes the duty of the trustee, under a proper order of the court of probate, to sell the prop-

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erty and convert the proceeds of the sale into a trust fund, to be held for the purposes named in the will. This disposes of the first question proposed.

The main questions of the case involve the rights of Gideon E. Holloway, Sr., in the trust fund, and are suggested by the following ambiguous language contained in one clause of the will, a construction of which will afford a general answer to nearly all the questions presented. This clause reads as follows:— "I direct that said trustee shall from time to time pay and transfer and convey to my said husband, for his use and benefit, so much of the income and principal of the above named property as my said husband may require for his own personal use; the same to be transferred and conveyed to my said husband upon his written request." In behalf of Holloway it is claimed that under this clause of the will he is entitled to full maintenance and support out of the trust-estate, as well from the principal as from the income, without regard to any other income or means of support he may have, and that it is obligatory upon the trustee to transfer and pay over the same to him upon his written request. In other words, that Holloway takes an equitable fee or an equitable absolute interest in the portion demanded by him, and that the legal title passes to him on the transfer. If this claim is correct Holloway can, by a single stroke of the pen, take possession of the entire trust estate, convert the same to his individual use, and excluding all other beneficiaries under the will, terminate the trust. Undoubtedly the language of the clause in question, standing alone, and considered without reference to the intention of the testatrix gathered from other parts of the instrument, would admit of the construction claimed. But here as in another recent case, we are satisfied that such a construction would defeat the manifest intent of the testatrix. *Glover* v. *Stillson*, 56 Conn. 318, 15 Atl. Rep. 752. In all these cases, courts are astute to discover the intention of the testator as gathered *ex visceribus testamenti*, by a careful scrutiny of the language of the en-

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tire instrument and by the situation of all parties and their relation to the subject matter. The struggle in such cases, observes Judge STORY, "is to accomplish the real objects of the testator so far as they can be accomplished consistently with the principles of law, but in no case to exceed his intention fairly deducible from the very words of the will." *Nightingale* v. *Mason*, 5 Mason, 336. As we read this will, we are convinced that the testatrix had two special objects which she desired to compass by the creation of the trust in question. First, as a devoted wife she desired to make suitable provision for the possible necessities of her husband; and, second, as a mother she was anxious that her only son and his children might have the benefit of any portion of the trust fund unexpended at the decease of her husband. To accomplish these objects she creates a trust by the following significant language: "This trust is to continue during the lives of my said husband and my said son, and during the life and minority of any of my said son's children, born as aforesaid." She next empowers the trustee to mortgage and to sell and convey the property whenever it may be for the advantage of the beneficiaries under the trust, stipulating that it shall not be sold in the life time of her husband without his consent. She forbids the use of any portion of the trust estate for payment of the debts of her husband or son, outstanding or thereafter contracted, provides for a disposition of the income after the death of her husband, directs that "any portion of said income not so expended may at the discretion of said trustee be added to the principal of said trust fund or be reserved to meet any extraordinary requirements of those for whose benefit said trust is created," and finally orders that upon the determination of the trust by the death of her husband and son or majority of her son's children, the trust estate shall be distributed under the provisions of the statute for the distribution of intestate estates. We cannot imagine what more explicit or forceful language the testatrix could have chosen, to evince her deliberate intent to create a trust

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that should permanently inure to the benefit of both husband and son, than that contained in the several provisions of her will above recited. This clearly expressed intention of the testatrix is utterly repugnant to the claim that Holloway can at his option terminate the trust by his written request. We are clear that a life estate only was intended to be created for her husband by the testatrix; except that in a certain emergency, hereafter referred to the whole fund might be devoted to his necessities. It is suggested that the power of disposal given to Holloway in the will, enlarges the life estate to a fee. This court, however, has recently held otherwise. In *Glover* v. *Stillson*, *supra*, CARPENTER, J., says: "The power of sale may in certain doubtful cases aid in ascertaining the intention, but to give it an artificial and technical force, and thereby defeat the manifest intention of the testator, is wholly inadmissible." See, also, *Lewis* v. *Palmer*, 46 Conn. 454; *Brant* v. *Virginia Coal & Iron Co.*, 93 U. S. 326; *Welsh* v. *Woodbury*, 144 Mass. 545, 11 N. E. Rep. 762. Holloway, therefore, having a life interest in the trust estate, to what extent and under what circumstances is the trustee authorized to pay over to him any of the income or principal thereof? This depends upon the construction to be given to the word "require" as used in the phrase "as my said husband may require for his own personal use." The word in itself is ambiguous. In behalf of Mr. Holloway it is claimed that it must be construed to mean "to demand" or "claim as of right and by authority." But the word "require" is as frequently and correctly used in the sense of "to need" or "to be requisite"; and we adopt this definition for the purposes of this case, which reconciles this clause with the manifest intention of the testatrix as gathered from all other parts of her will, and the relation which she occupied towards the beneficiaries as wife and mother. Under this construction, Mr. Holloway's participation in the trust fund is limited to his personal necessities. Both income and principal are placed under the same limi-

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tation and restriction. The testatrix did not intend that her trustee should pay over to her husband either income or principal, unless an emergency arose which demanded them for his personal support, and, if such a crisis in his affairs should arise, then she gave her trustee full power to exhaust the entire trust fund, if necessary, in providing for his personal support and maintenance. The remarks of LOOMIS, J., in giving the opinion of this court in the late case of *Peckham* v. *Lego*, 57 Conn. 555, 7 Am. Prob. Rep. 62, *supra*, are applicable here:—"The language necessarily implies a consciousness on the part of the testatrix that she had given only a life estate; but it occurs to her that the income may be so limited and their circumstances so reduced that they may lack the means of comfortable support, and she adds the clause under consideration to meet such an emergency; but this clause was never intended to sweep away the life estate. It was only to be called into play by an emergency—by the *needs* of her beneficiaries. The right to the principal was founded on necessity and restricted by necessity. If it should not be necessary it is all a mere life estate; if it is, then the restriction is that all except the necessary portion so taken remains a mere life estate. Holloway,is presumably self-supporting and possibly possessed of property far in excess of the entire trust estate. So long as he is able to support himself by his own exertions, or has property available for his support, the trustee has no right to pay over to him, on his demand or otherwise, any portion of the income or principal of the trust fund. The contingency must be his actual need, and not his expectation or opinion of it." *Hull* v. *Culver*, 34 Conn. 405. The judgment of the trustee must concur with that of Holloway as to the necessity of the use of either income or principal for his personal necessities. If they differ as to such necessity, or the income or principal of the trust estate should be wrongfully applied to Holloway's use, the Superior Court, as a court of equity, or possibly the probate court, would afford ample protection to all interested in the trust.

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We think the foregoing considerations sufficiently answer the second, third, fourth, and seventh questions of the complaint.

The fifth and sixth questions relate to the rights of Gideon E. Holloway, Jr., and Vera G. Holloway, his daughter, to share in the trust estate, and may be quickly disposed of. Neither is entitled to any benefit from the trust fund during the lifetime of Gideon E. Holloway, Sr. After his decease, by the plain provisions of the will, Gideon E. Holloway, Jr., and any children of his by marriage subsequent to the date of the will, stand on equal footing in relation to the trust estate and have equal right to the income of the trust fund for their benefit, maintenance and support, subject only to the discretion of the trustee as to the amount and time of payment; and the existence of a necessity for such application of the trust estate.

We advise the Superior Court that Gideon E. Holloway, Sr., is entitled to be paid nothing by the trustee from the trust estate until such time as the trustee is satisfied that he has need of the same for his personal support; that it is the duty of the trustee to hold the fund, and, if not required for the necessary support of Holloway, Sr., to allow the same to accumulate during his lifetime, and upon his decease the trustee may expend so much of the income as he may deem necessary for the benefit, support, and maintenance of Gideon E. Holloway, Jr., Vera G. Holloway, and any other children of said Gideon E. Holloway, Jr., entitled to the benefit of the trust.

In this opinion the other judges concurred.

See Peckham v. Lego, 7 Am. Prob. Rep. 66, *supra*, and the cross-reference note.

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CHASE *vs.* CARTWRIGHT.

(53 Arkansas, 358.)

LIFE ESTATE AND REMAINDERS.—TRUSTS.—EXECUTOR'S POWER TO CONVEY.

Under a will bequeathing testator's real and personal property in trust to executors for the purpose of disposing of it to the best of their judgment for the support and education of his two children, directing that the executors should pay none of the children's debts unless first authorized by them,and should cut off supplies if there were any extravagance, and making a gift over to others of the estate remaining, if the children should die without issue; it was held that the executors took the legal title in fee; that a conveyance of the property by the only acting executor was valid.

APPEAL from a judgment of the Circuit Court of Crittenden County. The facts are disclosed in the opinion.

W. M. Randolph, for appellants.

W. G. Weatherford, for appellees.

HEMINGWAY, J. The appellants, as residuary devisees and legatees under the will of Daniel Hughes, deceased, brought this suit. Daniel Hughes died resident in Shelby county, Tennessee, on the 10th of February, 1862, seized of the land in controversy. By last will, which was duly admitted to probate in that county in March, 1862, he disposed of his estate as follows: "All my real and personal estate I give in trust to my executors for the purpose of disposing of it to the best of their judgment, for the support and education of my two children, the children of Eliza Darragh, and the support of the said Eliza. For that purpose they are to give the said Eliza one thousand dollars a year until the eldest child is nine years old (it is now nearly two), and if either of the children should die before then, there shall be no change made as to the amount of a thousand a year. Should both children die before they are of age, Eliza Darragh is to receive out of my estate five hundred a year during her life. Should

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the net income of my estate be two thousand dollars a year, after paying the legacies hereinafter mentioned, I wish my father to have five hundred dollars a year of this income during his life, and, if my mother outlives him, she is to receive it after his death. The residue is to be invested in Memphis City bonds until the children, or the survivor of them, is sent to college. I desire my executors to exercise their best judgment in the selecting of a suitable school, and to be liberal, if the means are in their hands to procure them a good education. But my executors are requested to check and stop the supplies if they should be satisfied there is extravagance by the children, and to pay no bills of theirs not authorized by the executors before contracted by the child, or children; I wish the children plenty, but not waste." And the following: "In the event of the death of both of my children, mentioned above, before they have a child, or children to inherit to them, I give to Elizabeth Higgins and Mary Ann Hughes all my estate remaining, except the annuities as above mentioned." And the following: "I appoint James Hughes (my father), William Park and John Canavan the executors of my will. I know it is an unpleasant task, but I would render either of them any service in my power. They are to be required to give no security, for they will not abuse their trust." Of the parties named as executors, James Hughes never qualified and William Park, who qualified, resigned in 1865. John Cannavan, the remaining executor, died in 1877, without, it appears, having resigned or concluded his trust.

The will was duly admitted to probate in Crittenden county, this State, on the 2d day of March, 1866. There seems to have been at different times a scrambling administration of the estate, conducted by various parties under appointment from the probate court in that county; but, in the view of the case taken by us, it is unnecessary to consider the legal aspect or effect of the administration in this State. It was characterized by unseemly conduct, which cannot be contemplated without condemnation. On the 16th of October, 1866, John

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Cannavan, the only acting executor, sold and conveyed to Asa Hodges the land in controversy for $1,280 in cash and $1,280 payable 12 months after the date thereof, to secure which a lien was expressly reserved in the face of the deed. The appellees claim title by purchase from Hodges. Lizzie Darragh, one of the children named in the will, died before the testator; Eliza Darragh, her mother, died in 1865; Daniel Darragh, the second child, left his residence in Memphis about 1870, and was not afterwards heard from by his relatives or friends, and is presumed to be dead. He was unmarried, and died without a child to inherit from him. The appellant, Mary Ann Winters, was a married woman when Daniel Darragh died, and so continued to the bringing of this suit.

The appellants seek (1) to recover the land conveyed by Cannavan, as executor, to Hodges; but, in the event that they are not entitled to that relief, they seek (2) to recover the sum of $1,280 with interest, being the unpaid installment of purchase money secured by him on the land, in the deed above mentioned. In support of their claim they say (1) that the will did not confer a power of sale on the executors; (2) that the power conferred could not be executed by one only of the executors; and (3) that a sale was authorized only upon stated conditions, which did not exist when it was made. The appellees insist (1) that a power of sale was conferred by the will; (2) that it was duly executed; and (3) that they purchased in good faith, and entered immediately into possession of the land, that they had continually held it for 17 years, claiming title against the world, and that they had good title by limitation; (4) that the installment of purchase money was paid; and (5) that it was barred by limitation. The proof sustained their contention as to their possession of the land. There was trial by the court, and judgment for the defendant. It is insisted that the judgment is wrong, and should be reversed for many reasons pressed upon our attention. In the view we have taken, it is essential for us to consider only the defense of limi-

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tation and such other matters as are involved in its correct determination.

The appellants contend that, until the death of Daniel Darragh, they had no right in possession, but only in remainder; that they were not entitled to bring any suit either for the land or the purchase money during his life; that the statute was not set in motion against them until he died, and that they brought this suit in apt time thereafter. If mistaken in that contention, their claim to the land must fail against the plea of limitation. Is it correct? Our answer must depend upon the construction of the will, for it makes a great difference whether the executors are held to have acquired the legal title for life or in fee.

The language of the will leaves no room for doubt as to the wish of the testator in that regard. His purpose as to the disposition of his estate is clearly and concisely stated in the first clause of the will. It gives all his real and personal estate in trust to his executors, for the purpose of disposing of it to the best of their judgment, for the support and education of his two children, and for the support of Eliza Darragh. The executors are directed to pay certain annuities and money bequests, the latter aggregating about $10,000. If the two children die without leaving a child or children who could inherit, the estate remaining is devised over to the appellants. The language of the grant to the executors, in its ordinary acceptation would be held to convey an estate in fee. 1 Sugd. Pow., *129, *130. There is nothing to limit the estate passed to a life estate only, as in the case of *Patty* v. *Goolsby*, 51 Ark., 61, 9 S. W. Rep. 846. That the natural import of the terms of the grant correctly reflect the wish of the testator, gains support from the power given them to dispose of realty and personalty alike in their best judgment, from the directions to pay out large sums of money to supply which no other means are indicated, and from the devise over of all his estate remaining. The phrase "estate remaining," was evidently not used in the legal sense of a remainder, but to cover what was left after

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special directions were executed. The testator intended his executors to take absolutely the legal title to all his property to pay off the special bequests—to provide as he directed for Eliza Darragh and her children —and, to those ends, to sell or otherwise dispose of his property as their judgment might direct. Whatever was not sold or consumed in paying the bequests and the matured annuities, the trustees were to hold for the purposes indicated; and if both children died without a child to inherit, the estate remaining was to go to the appellants, subject to the payment of the future annuities to Eliza and his father. The grant to the executors and the power to sell are co-extensive, and neither can be restricted to a life estate or an estate less than a fee, without importing into the terms of the grant a meaning they do not express. As we have seen, there is no purpose indicated that requires such a construction, but, on the contrary, the natural import of the terms consists with the general purpose of the testator as indicated in the will. The executors had no beneficial interest in the property, but, holding the legal title to the fee in trust, they were trustees for all persons who had equitable interests carved out of the fee, whether in possession or in remainder. If the conveyance by Cannavan was void, and the grantees entered under it, a right then accrued to the executors to dispossess them, and, being trustees of an express trust, they could have sued in their own names. If the deed was inoperative for want of legal authority to make it, Cannavan was not estopped to sue to dispossess persons claiming under it, as was expressly ruled by the Supreme Court of the United States in the case of *Meeks* v. *Opherts*, 100 U. S. 564; Bigelow on Estoppel, 349 (5th ed.); *Pells* v. *Webquish*, 129 Mass. 469; *Mason* v. *Mason*, 140 Mass. 63, 3 N. E. Rep. 19; *James* v. *Wilder*, 25 Minn. 305. Seven years' adverse possession was sufficient to bar the right of the trustees, they being under no disability; but whenever the right of action in the trustees is barred by limitation, the right of *cestuis que trust* thus represented is also barred.

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Hill on Trustees, p. 403; Wood on Lim. § 208; *Smilie* v. *Biffle*, 2 Pa. St. 52; *Meek* v. *Opherts*, 100 U. S. 564; *Trimble* v. *Woodhead*, 102 U. S. 647; *Molton* v. *Henderson*, 62 Ala. 426; *Wingfield* v. *Virgin*, 51 Ga. 139; *Clayton* v. *Cagle*, 97 N. C. 300, 1 S. E. Rep. 523. This rule was applied by the Supreme Court of the United States in the case of *Meeks* v. *Opherts*, 100 U. S. *supra*, against the right of a *cestui que trust* in a vested remainder. It has been applied similarly by other courts, and there are now no doubts that it is sound in principle and accepted by the courts. The question of the application of the rule to claims of contingent remainders seems to have arisen in but few American cases; but it has been held by the courts of last resort in two States, that when the trustee is barred, the *cestui que trust*, holding a contingent remainder is also barred. *Edwards* v. *Woolfolk*, 17 B. Mon. 376; *Waring* v. *Cheraw & Darlington R. R. Co.*, 16 S. C. 416. In our investigation we have found no case in which a contrary rule was favored, and as the trustee represents alike all *cestuis que trust*, whether entitled in possession or in remainder, vested or contingent, we think the same rule should apply to the claim of each of them in determining the effect upon it of the bar of the trustee's right by limitation. The disability of the *cestui que trust* is immaterial, if the trustee is under none. Hill on Trustees, p. 504, and cases above cited. This court has repeatedly held that the bar by limitation of the right of the life tenant does not affect the right of the remainderman against whom limitation will not run until his right of possession accrues. Those were cases in which the tenant for life and the remainderman each held his estate at law, and where no right of action accrued in behalf of the remainder man, until the estate for life determined. But in this case, as we have seen, the right of action accrued to the trustees for the benefit of all beneficially interested as soon as the adverse possession began, and, if they failed to institute suit, the *cestuis que trust* might have resorted to equity for the protection of their interests. The rule does not ap-

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ply to the claims of the *cestuis que trust* against the trustee, or against those who purchase trust property from the trustee in fraud of the trust.

The lien reserved in the face of the deed is, as contended, an equitable mortgage; but by its terms it only charges a lien on the land in favor of the creditor, and does not, like the mortgage in law, invest the creditor with title to the land to be held as security. In the case of Stephens v. Shannon, 43 Ark. 464, this court held that the lien so reserved was but an incident to the debt thereby secured, and that the lien expired when the debt was barred by limitation. It follows that the right to recover the land, and also the right to foreclose the lien reserved in the deed, were barred by limitation, and that the judgment below was correct.

Affirmed.

Statute of Limitations—When trustee is barred, the cestui que trust also is barred. —In the case of Meeks v. Olpherts, 100 U. S. 564, 569, the Supreme Court of the United States, Mr. Justice Miller delivering the opinion, said: "Whatever doubt may have existed at one time on the subject, there remains none at the present day, that whenever the right of action in the trustees is barred by the Statute of Limitations, the right of the *cestui que trust* thus represented, is also barred. This doctrine is clearly stated in Hill on Trustees, 267, 403, 504, and the authorities here cited fully sustain the text, both English and American."

In Smilie v. Biffler, 2 Pa. St. 52, land was devised to executors, with a power of sale, which was imperfectly executed, by one of the executors alone. The devisee brought suit against the purchaser, and was held to be barred by the Statute of Limitations. After referring to the old opinion and expressing surprise that it should ever have been entertained, and showing how it was overruled by Lord Hardwicke in Lewellen v. Macworth, 2 Eq. Cas. Abr. 579, the court said: "Therefore, where *cestui que* trust and trustees are both out of possession, for the time limited, the party in possession has a good title against both. By the terms of the will, the trustee had the right to enter on the land, to take the rents, issues and profits, and apply the same to the separate use of Jane Craig, the testator's daughter, during her natural life, with power to sell the fee-simple and appropriate the interest of the purchase-money to her use, and after her death to be paid to certain legatees, of whom the present plaintiff was one. The property was sold in the lifetime of Jane Craig; but the sale was the act of but one of the trustees, and it is contended that the execution of the joint trust must be the act of all. In this respect the

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title of Nicholson, the purchaser, is manifestly defective. But Nicholson took possession of the premises in pursuance of the contract, and held the same for upwards of twenty-one years. He, therefore, held adversely to both *cestui que* trust and trustee, and consequently obtained by the Statute of Limitations an indefeasible title, which cannot now be disturbed or gainsaid."

In Rosson v. Anderson, 8 B. Mon. 423, the question related to the title of slaves conveyed by a father to a trustee for his daughter. The trustee did not accept the trust, nor were the slaves ever delivered by the donor. One of the granddaughters, after her father's death, which occurred while she was a minor, brought suit for the slaves, and was met by a plea of the Statute of Limitations, to which she replied her infancy. The court held that the right of action, on the death of her father, vested in his executors, and as more than five years had elapsed after they had qualified as such, the statute was a bar against them, and as they were barred by the statute, so was the heir, though a minor when the cause of action accrued.

In Darnall v. Adams, 13 B. Mon. 273, which concerned a bequest of slaves, it was held that the disability of coverture in the legatee could not prevent the running of the Statute of Limitations in favor of an adverse possession against the executor, and that it was well settled that the claim of the legatee, was under such circumstances, barred by the lapse of time which barred the executor.

Coleman v. Walker, 3 Met. (Ky.) 65 and Edwards v. Woolfolk, 17 B. Mon. 376, are cases which assert the same doctrine, and in the latter, the principle is fully and ably discussed and its soundness maintained.

In Croxall v. Sherrard, 5 Wall, 268, a remainderman was held barred by the Statute of Limitations of New Jersey, on account of the number of years of possession of defendant under purchase from the holder of the estate for life, all of which had elapsed during that life. This was held to be a bar, although the remainderman brought suit immediately on the death of his ancestor. This, however, was based upon the peculiar wording of the New Jersey statute.

In Cunningham v. Ashley, 45 Cal. 485, it was held that an administrator, who is a party to a suit which involves the title of his intestate to real estate, represents the title which the deceased had at the time of his death, and the judgment in such action concludes the adverse party and the heirs of the intestate, and is an estoppel as to the title set up in the action.

See Peckham v. Lego, 7 Am. Prob. Rep. 66, *supra*, as to the executor's power to convey.

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ROQUET *vs.* ELDRIDGE.

(118 Indiana, 147.)

GENERAL LEGACIES.—ADEMPTION.—MARRIED WOMEN.

Legacies of a certain sum of money bequeathed in a will reciting that they are to be considered as the disposition of the homestead farm among the testator's children and are not to affect any other interest or estate, are neither specific nor demonstrative, but general, and, as such, capable of being adeemed by gifts of the same amount for which testator takes receipts showing that the payments are in consideration of the legatee's interest in the farm under the will.

Money paid to a married woman in ademption of a legacy produces the same legal result as if she were unmarried.

APPEAL from a judgment of the Circuit Court of Vigo County. The facts are disclosed by the opinion.

C. F. McNutt, *S. C. Stimson*, and *R. B. Stimson*, for appellants.

S. C. Davis and *S. B. Davis*, for appellees.

MITCHELL, J. After the issues were joined in the court below the judgment appealed from was rendered upon an agreed statement of facts. The questions for decision arise out of the facts agreed upon, which, so far as they are material—are as follows: In November, 1863, William B. Eldridge executed his last will and testament, by the second clause of which he devised to his sons Hamilton Eldridge and Abram A. Eldridge his homestead farm, to be held by them jointly. To his daughters, Amanda and Cynthia, and to his sons William G. and Robert B., he bequeathed $500 each, to be paid in cash, which sums were to be taken and considered as in full of each of their respective interests in the homestead farm. The will contained a recital, the effect of which was that the devises and bequests thus made were to be considered as the disposition of the homestead farm among the testator's children, and were not to affect any other interest or estate. After-

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wards, and during the lifetime of the testator, his sons Hamilton and Abram A. Eldridge, devisees of the homestead farm, furnished their father $2,000 in money, out of which he paid to each of the four legatees above named the sum of $500, and received from each a receipt of the following tenor, viz.: "Received of William B. Eldridge, $500, in consideration of my interest in his homestead farm, corresponding with his last will." One of the daughters was a married woman at the time she received the money and executed the receipt therefor as above. The testator died in February, 1881, having had but the six children named above. He had only about $500 in value of personal property, which, with the farm above mentioned, valued at about $6,400, comprised his whole estate.

On behalf of the administrator with the will annexed, it is insisted that the sums paid to the several legatees by the testator in his life-time constituted a satisfaction or ademption of the legacies provided by the will, while the legatees insist that the legacies are specific or demonstrative in their character, and that since it does not appear that the money paid them was raised out of, or derived from, the land comprised in the homestead farm, the payment did not work an ademption of the sums bequeathed by the will. The legacies were, however, neither specific nor demonstrative. Speaking upon the subject of specific legacies, the Lord Chancellor, *Fielding* v. *Preston*, 1 De G. & J. 438, said: "There have been attempts in various cases, to determine the meaning of a specific legacy, and what is the test whereby such legacies may be distinguished from general bequests. There are objections to most of the definitions, but I think we are quite safe in treating that as a specific bequest which the testator directs to be enjoyed *in specie*."

A legacy is specific when it can be satisfied only by the transfer or delivery of some particular portion of, or article belonging to, the estate, which the testator intended should be transferred to the legatee in specie. 2 Redfield Wills, 132; Rapalje & Lawrence Law Dict. tit.

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"Legacy." Lord HARDWICKE said, in *Ellis* v. *Walker*, Amb. 309: "The court leans against considering legacies as specific." Unless, therefore, it appears that the money or thing to be transferred is so clearly identified and inherently described as that the legatee can say to the executor that all, or a portion, of the very fund or property in question was transferred by the will, the bequest will not be regarded as specific. *Sidebotham* v. *Watson*, 11 Hare, 170.

While it is true the doctrine of ademption does not apply to specific devises or legacies, as a general rule —*Swails* v. *Swails*, 98 Ind. 511—yet even in case of a specific devise or bequest, if the very thing devised or bequeathed had been transferred to the devisee or legatee in the lifetime of the testator, so that there would be nothing left for the will to operate upon, an effectual ademption would have taken place.

Accepting the foregoing as the true criterion of a specific legacy, it becomes clear that the bequest of $500 in cash to each of the sons and daughters named, and the further direction that this was to be considered in full of their respective interests in the homestead farm, and that the devises and bequests previously made were not to affect any other interest or estate, did not constitute a specific bequest of any portion of the testator's estate to be transferred in specie. Neither did the legacies belong to that intermediate class which are sometimes denominated demonstrative, and which are peculiar, in that they are not ordinarily liable to be adeemed or abated by an advancement made in a general way. "A demonstrative legacy is 'a bequest of a sum of money payable out of a particular fund or thing.' It is a pecuniary legacy, 'given generally, but with a demonstration of a particular fund as the source of its payment.' It is, therefore, equivalent to, or in the nature of, a devise or bequest of so much or such a part of the fund or thing specified." *Glass* v. *Dunn*, 17 Ohio St. 413; 5 Am. & Eng. Ency. of Law, p. 541; 2 Redfield on Wills, 140, 141.

While it is quite true the will plainly indicates that

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the sum bequeathed to the sons and daughters named were to be taken in full of their respective interests in the homestead farm, which was specifically devised to the two other sons named in the will, there is no direction that the bequests are to be paid out of any particular fund, or that the fund out of which the payment is to be made is to be derived from the rents, issues or profits of the land, or that the legatees are to have any interest as such in the land itself. The implication is that the bequests were chargeable against the devisees of the land, or, at most, that they should be chargeable upon the farm. Moreover, since it appears by the agreed statement of facts that the sons to whom the homestead farm was devised furnished the money with which the legacies were paid, it is not apparent why this should not be held to satisfy the bequests, even though it should be conceded that they were payable out of the land. If thus payable, it must have been contemplated that the amount should constitute a charge upon the farm, to be removed by the devisees at some time by paying the several amounts of the legatees. We know of no authority which would justify a holding that a general legacy, which is payable out of a particular fund, or in a specified manner, may not be satisfied in case the legatee receives the amount thereof from the testator in his lifetime out of the very fund devoted to the payment of the bequest, provided it clearly appears that the amount was given and received with the intention that it should work an ademption of the legacies. If we assume that the homestead farm was to be the source from which the fund was to be derived out of which the legacies were payable, the conclusion follows that the devisees of the farm were to take it subject to the burden of paying the legacies after the testator's death. Having furnished the money to the testator, during his lifetime, with which to pay off the bequests, and the money having been paid to the legatees and received by them for that purpose, the legacies are effectually satisfied from the very source contemplated by the will. An ademption

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results where a parent, or other person standing *in loco parentis*, after having made a bequest, gives a portion to the child to whom the bequest is made, equal to or in excess of the amount bequeathed, the portion given and the legacy being *ejusdem generis*. *Weston* v. *Johnson*, 48 Ind. 1. Within the rule thus stated, the legacies were adeemed.

Whether a legacy be specific or demonstrative, if it clearly appears that the particular thing or fund bequeathed has been irrevocably delivered over to the legatee in the lifetime of the testator, the legacy is adeemed because the testator's title to the thing or fund has been divested by the gift and has become vested in the legatee during the lifetime of the testator. *Clayton* v. *Akin*, 38 Ga. 320.

The fact that one of the legatees was a married woman at the time she received the money from her father and signed the receipt, is of no consequence. The receipt of the money from the source contemplated by the will satisfied the legacy by operation of law, and not by force of any contract. Money paid to a married woman in ademption of a legacy, produces the same legal result as if she were unmarried. There was no error.

The judgment is affirmed with costs.

See further as to ademption, Burham v. Comfort, 6 Am. Prob. Rep. 273, and monographic note, "Whether the doctrine of ademption by advancement is applicable to devises of realty"; Cowles v. Cowles, 6 Am. Prob. Rep. 469, and the cross-references; and Hart v. Johnson, *supra*.

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FOSHER *vs.* GUILLIAMS.

(120 Indiana, 172.)

DOWER.—ELECTION.

Under the Indiana Statute (Ind. Rev. Stat. 1881, sec. 2505 as amended by Laws of 1885, ch. 103) providing that a widow's election against the will be in writing signed and acknowledged by her within one year after probate of the will, actual possession of one-third of the land, in ignorance of the requirement, is not sufficient; and if she die within the year without having exercised her power to elect, the right cannot be exercised by her heirs.

APPEAL from a judgment of the Circuit Court of Putnam County. The facts appear in the opinion.

T. E. Ballard & *E. E. Ballard*, for appellants.

J. J. Smiley, *W. G. Neff* & *J. L. Myers*, for appellee.

MITCHELL, J. John Fosher, who died testate on the 8th day of April, 1888, devised his real and personal estate to his widow, who was his childless second wife, for life, and provided that at her death the property should be distributed among certain of his children by a former marriage. The widow died in November, 1888, less than a year after her husband's death, and the executor of the last will and testament petitioned the court for an order to sell all the real estate, alleging that it was necessary to sell it, in order to make assets to pay debts and legacies. The heirs resisted the application to sell, so far as it applied to one-third of the land, and alleged that the widow rejected the provision made for her by the will, and elected to take the one-third in fee, under the law. They claimed that at her death the one-third which she took as widow, descended to them in fee simple, free from the debts of their father, according to the construction placed upon sections 2483 and 2487, Rev. St. 1881. *Caywood* v. *Medsker*, 84 Ind. 520; *Bryan* v. *Uland*, 101 Ind. 477, 1 N. E. Rep. 52. The validity of their contention depends

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upon whether the widow took under the will or under the statute. It is alleged that after the testator's death the widow renounced the will, so far as it made provision for her, and elected to take under the law, and that by agreement with the other heirs she took possession of a portion of the real estate equivalent to one-third in value, which was by mutual agreement set off to her, but that she never made any written election, as required by statute, for the reason that she had no knowledge or information that any such election was necessary. Section 41 of an act entitled "An act regulating descents and the apportionment of estates," as amended by an act approved April 13, 1885, reads as follows: "If lands be devised to a woman, or a pecuniary or other provision be made for her by the will of her late husband, in lieu of her right to lands of her husband, she shall take under the will of her said husband, unless she shall make her election whether she will take the lands so devised or the provision so made, or whether she will retain the right to one-third of the land of her late husband; but she shall not be entitled to both unless it plainly appear by the will to have been the intention of the testator that she should have such lands, or pecuniary or other provision thus devised or bequeathed in addition to her rights in the lands of her husband. Such election shall be in writing, signed by such woman and acknowledged before some officer authorized to take the acknowledgment of deeds, and shall be made within one year after said will has been admitted to probate in this State, and be filed and recorded in the office of the clerk of the circuit court in which such will is probated." Elliott's Supp. § 428. It is conceded that the widow did not make an election in accordance with the above statute, but it is insisted that because she made an election, *in fact*, by taking actual possession of one-third of the land, her election became as effectual as if made according to the provisions of the statute. This result is said to follow, from the fact that she did not know, and was not informed, that a written election was necessary.

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This position is not maintainable. According to the imperative language of the above statute, if there be a will in which lands are devised to a widow "she shall take under the will, unless she shall make her election" in the manner therein prescribed, within one year. The right of a wife to take an interest in the real estate of which her husband dies seized is a statutory right, and, where provision is made for her by the will of her husband, her right to take under the law depends upon conditions precedent, to be performed by her within one year. Those conditions are minutely set forth in the statute above set out, which forms part of the law regulating the descent and apportionment of estates. The renunciation of the will and the election to take under the statute must be made in substantial compliance with the statute which confers the right. In all cases where there is a will the widow is conclusively bound by it, unless she renounces its provisions and elects in the manner pointed out in the statute. *Stephens* v. *Gibbes*, 14 Fla. 331; *Waterbury* v. *Netherland*, 6 Heisk. 512. The case in hearing is, in all respects, parallel with *Cowdrey* v. *Hitchcock*, 103, Ill. 262. In that case a widow had accepted an award set off to her by appraisers, and it was afterwards claimed that she had thereby renounced the provisions of the will and elected to take under the law. The court, remarking upon a statute in all essential respects similar to that which controls the present case, said: "Here is a complete mode pointed out by the statute, under which a widow may renounce the provisions of a will, and if she fails to pursue the course pointed out by the statute within one year from the date letters testamentary are issued, she is, by the express terms of the statute, deemed to have elected to take under the will." As was well remarked in *Price* v. *Woodford*, 43 Mo. 247; "The right of election is a statutory privilege, conferring new and important benefits, and outside of the statute has no existence. It must therefore be exercised in substantial compliance with it." *Ewing* v. *Ewing*, 44 Mo. 23; *Dougherty* v. *Barnes*, 64 Mo. 159. The

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right to elect is strictly personal, which can be exercised by the widow alone, and although she dies before the time for election has expired, in the absence of a statute authorizing it to be made afterwards by her heirs or representatives, the right of election expires with her. 1 Woerner, Law of Admin. 270. If through any fraud or contrivance of those interested in the estate, the widow was prevented from making an election, a court of equity might find means of affording relief against those who perpetrated the fraud. There is, however, no question of fraud involved in the present case, and we therefore decide nothing upon that subject.

The judgment is affirmed with costs.

See Corry v. Lamb, 6 Am. Prob. Rep. 567, and the cross-references.

APPEAL OF LANE.

(57 Connecticut, 182)

ATTESTATION.—VALIDITY.—RETROSPECTIVE LEGISLATION.

The formal attestation of wills is governed by the statute in force at the time of execution and not by the statute existing at the time of the testator's death.

APPEAL from a judgment of the Superior Court of Windham County. The opinion discloses the facts.

J. Halsey and *M. A. Shumway*, for appellant.

J. H. Potter, for the appellee.

LOOMIS, J. In January, 1879, Mrs. Hannah P. Dimick made and executed what purported to be her last

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will and testament. It was first signed by her in the presence of only one witness, and subsequently taken to the second witness, and after that to the third, each of whom signed as a witness in the absence of the other two. This paper remained without change until the death of the testatrix, on the 6th day of February, 1888, and afterwards on the 3rd day of March, 1888, the same was presented to the probate court and there approved as her last will and testament. Upon appeal to the Superior Court the decree of the probate court was reversed, and the appellee now brings the case to this court for the revision of alleged errors in the Superior Court. The sole question is—whether the instrument was invalid as a will for want of proper attestation. The answer depends upon the construction and effect of our statutes relating to the execution and attestation of wills. The difficulty however is not so much in determining the meaning of our statutes, as in ascertaining which of two different statutes applies. If we take the statute in force when the instrument was executed, which positively required the witnesses to sign in the presence of each other and of the testator, the attestation was clearly contrary to law and the will was void. If, on the other hand, we take and apply the statute as it stood at the decease of the testatrix, which was first passed in 1885, the attestation was legal, and the instrument valid as a will. The statute in force when the will was attested provided that "no will or codicil shall be valid to pass any estate, unless it be in writing, subscribed by the testator, and attested by three witnesses, all of them subscribing in his presence, and the presence of each other; but no will of personal estate made before the 27th day of June, 1848, shall be invalid if not so attested; and all wills executed according to the laws of the state or country where they were executed may be admitted to probate in this state." General Statutes of 1875, p. 369, § 2. The statute in force at the death of the testatrix provided that "no will or codicil shall

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be valid to pass any estate unless it be in writing, subscribed by the testator, and attested by three witnesses, each of them subscribing in his presence; and all wills executed according to the laws of the state or country where they are executed, may be admitted to probate in this state, and shall be effectual to pass any estate of the testator situated in this state." General Statutes of 1888, § 538.

As a will is ambulatory during the lifetime of the one executing it, and no rights can vest under it till the death of the testator, it must be conceded to be within the rightful authority of the legislature, until the death of such testator, by retroactive legislation to change formalities previously prescribed for the due execution of wills, and to affect every instrument previously executed, making it valid or invalid, as the case may be. But it is one of the fundamental canons of construction adopted everywhere, and most firmly held by this court, that a statute shall always be interpreted so as to operate prospectively, and not retrospectively, unless the language is so clear as to preclude all question as to the intention of the legislature. *Brewster* v. *McCall's Devisees*, 15 Conn. 274; *Goodsell's Appeal*, from Probate, 55 Conn. 171, 10 Atl. Rep. 557. In the light of this well settled rule it would seem impossible to give the last-mentioned statute a retroactive operation, for not only is such intent not made clear but the contrary more clearly appears. All the provisions look forward rather than backward. But, suppose the act is not clear either way, are there any other principles which may control, and enable us to determine whether the validity of the execution of a will should be determined by the law existing at the execution, or as it was at the death of the testator. Upon this question there is a disagreement among the authorities, to which we may hereafter refer, but at present we will look only at the reasons for the differing opinions. The reasons for applying the later statute, stating them as strongly as possible, are as follows:—"As until the death of the testator the paper

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executed by him, expressing his wishes, is not a will, but a mere inchoate act which may or may not be a will, the law in force at the testator's death applies, and controls the proof of the will." *Sutton* v. *Chenault*, 18 Geo., 1. This in substance, is the reasoning of all the courts that have accepted the doctrine that the validity of a will must be determined by the law existing at the death of the testator.

But, as plausible as the reasoning may seem we think it is fallacious, at least as applicable to our laws. The act of bequeathing or devising is something more than inchoate or ambulatory. On the other hand it becomes a completed act when the will is executed and attested according to law, although it does not take effect on the property till a future time. A power of revocation is retained for life, but even that, to be effectual, must be exercised in the way and manner prescribed. What need could there be of any revocation, with prescribed formalities, if the executed paper is to be considered only as an expression of the signer's wish and is in no sense a will. The latest wish, however expressed, ought to overcome the former. The theory of our statutes seems to us directly opposed to the reasoning referred to, however it may be with the statutes of other jurisdictions. Certain formalities of execution and attestation are prescribed as prerequisites to the validity of a will, and without compliance with which it is no will at all, although it is clearly a wish. In terms it is declared to be incompetent to pass the title to property at the death of the testator. The precise language is:—"No will or codicil shall be valid to pass any estate unless," etc. So that our statute amounts to a positive rule for the transmission of property, which must be complied with, as a complete act at the time of execution, or never, so far as the act of the testator is concerned. And what the statute makes positively bad can only be made good by positive legislation, manifestly retrospective. Our law in effect says to every person who would make a valid disposition of his property by will, that he must ob-

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serve the specified formalities, and if he complies, it contains an implied assurance that he shall not be disappointed and defeated in his purposes by any subsequent change, unless the new law clearly affect wills previously made.

That such is the true theory of our statutes is rendered still more manifest, we think, by reference to the provision, which has for more than a century existed, that at the time of executing a will, or at any time during his life, the testator may obtain the affidavit of the witnesses of the facts required to prove it in court, which, having been written upon or attached to the will, "shall be accepted by the court of probate, as if it had been taken before said court." General Statutes of 1784, p. 264, and of 1888, § 545. It has thus been the settled policy of our law in effect to assure the person who executes a will, not only that the prescribed formalities shall be sufficient and controlling, but that even the evidence of the proper execution shall be sufficient finally to establish it, though many years shall have intervened. Under such a system surely it cannot be said that what the testator has thus prepared for his will is only a mere paper upon which he has indicated simply his wishes at the time as to the final disposition of his property. If we have rightly apprehended the true theory of our statute laws no further vindication of the ruling of the Superior Court is necessary. If, however, our views find confirmation in the decisions of the courts of other jurisdictions, we may well feel greater assurance that we are right. This subject has not been much discussed in the courts of the United States, and the few decisions that may be found on the subject are not harmonious, as we have before stated. The text writers make only a brief reference to the question. Of these, Jarman and Redfield favor the doctrine that the law existing at the death of the testator controls, rather than that at the date of execution. 1 Jarman on Wills, 337; 1 Redfield on Wills, 4th ed. side p. 408. In 1 Williams on Ex'rs, 4th ed. top p. 94, note, the question is left as doubtful. In

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Schouler on Wills, § 2, and in 1 Rev., Swift's Digest, 140, the contrary view is held. The courts of New York, South Carolina and Georgia adopt substantially the proposition as laid down by the text writers first mentioned. *Lawrence* v. *Hebbard*, 1 Bradford, 252; *Houston* v. *Houston*, 3 McCord, 491; *Elcock's Will*, 4 McCord, 39; *Sutton* v. *Chenault*, 18 Ga. 1; *Hargroves* v. *Redd*, 43 Ga. 142. But the courts of England and Vermont and Pennsylvania have adopted substantially the principles for which we contend. *Downing* v. *Townsend*, Ambler, 280; *Gillmore* v. *Shooter's Ex'r*, 2 Mod. 310; *Giddings* v. *Turgeon*, 58 Verm., 106; *Mullen* v. *McKelvy*, 5 Watts, 399; *Taylor* v. *Mitchell*, 57 Penn. St. 209. The difference of opinion referred to may perhaps be attributed in some measure to a difference in the language and theory of the local statutes. For instance, in *Lawrence* v. *Hebbard*, *supra*, the surrogate, while he adopts the line of reasoning referred to as contained in *Sutton* v. *Chenault*, *supra*, yet he emphasizes the fact that the statute of New York in terms refers to wills previously executed and says they shall not be made void, and thereby contains an implication that they may be made good by the latest statute, and so the court holds. The Courts of South Carolina confine their decisions to wills of personal property. Referring to the distinction between wills as to personal and real estate, they intimate that as to the latter the law, existing at the date of execution may possibly control upon the ground that to transfer the title to real estate the existing statutory regulations may possibly control. But our statute practically abolishes any such distinction by putting wills of personal estate upon the same ground as those affecting realty, so far as the formalities of the execution of the will are concerned; the language being "no will shall be valid to pass *any* estate" unless, etc. The counsel for the appellee contended that the case of *Giddings* v. *Turgeon*, *supra*, had no application because the question there was so different from the one in the case at bar. While conceding the difference between the two cases we still think the principal adopted by the court

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is applicable. The validity of the entire will was there under consideration, in which one of the legatees was a married woman, whose husband was one of the witnesses to the execution of the will. As the law of Vermont then stood he was incompetent as a witness, and it was improperly attested. By a subsequent act, however, a husband was made a competent witness, where a legacy had been given to his wife, to prove and establish the will, although the legacy to the wife would not be good. It was contended that the subsequent law would apply, but the court held that the will was not good, because it must be proved as the law required at the time of its execution, which is the principle contended for here. In *Taylor* v. *Mitchell*, *supra*, the point was made that the will there in question was void under the statute in force when the testator died. The case was very well considered, and in the opinion of the court by SHARSWOOD, J., it is said: "Retrospective laws generally, if not universally, work injustice, and ought to be so construed only when the mandate of the legislature is imperative. When a testator makes a will, formally executed according to the requirements of the law existing at the time of its execution, it would unjustly disappoint his lawful right of disposition to apply to it a rule subsequently enacted, though before his death. While it is true that every one is presumed to know the law, the maxim in fact is inapplicable to such a case; for he would have an equal right to presume that no new law would affect his past act and rest satisfied in security on that presumption. * * * It is true that every will is ambulatory until the death of the testator, and the disposition made by it does not actually take effect until then. General words apply to the property of which the testator dies possessed, and he retains the power of revocation as long as he lives. The act of bequeathing or devising, however, takes place when the will is executed, though to go into effect at a future time."

No case hitherto has been before this court involving

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the precise question now under consideration, but analogous questions have been discussed in several cases, and principles applied to them which naturally and logically lead to the result we have reached in this case.

In *Brewster* v. *McCall's Devisees*, 15 Conn. 274, one question was whether the will, executed in 1826, by a person who died in 1838, could convey real estate purchased after the will was executed and before the act of 1831, which provided for the devising of real estate not owned by a testator at the time of executing his will but acquired afterwards. The court, in refusing to apply the act existing at the death of the testator, said: "The general rule is that statutes shall not be construed retrospectively, unless by their express terms or otherwise such appears to be the legislature. * * * Here there is nothing from which we have a right to infer that it was intended to affect any wills which had been executed prior to the passing of the act."

In *Gaylor's Appeal from Probate*, 43 Conn. 82, the question was whether under the statute existing when the will was made, (Gen. Statutes of 1866, p. 402,) witnesses must subscribe in the presence of each other, CARPENTER, J., in giving the opinion of the court, says, on p. 85: "The language of our statute existing when the will was made is explicit and entirely free from ambiguity. It only requires that all the witnesses shall subscribe their names in the presence of the testator. * * * In the revision of 1875 we find, in addition to the statute as it previously existed, the clause inserted, 'and in the presence of each other.' But that cannot affect the validity of any will previously executed." In *Goodsell's Appeal from Probate*, 55 Conn. 171, the will was made in January, 1871, and the testator married in May following, and died in 1886, leaving a widow, but no child had been born to him. When the will was executed and when the marriage took place the common law was in force which required both a subsequent marriage and the birth of a child to revoke a will. In 1885 an act was passed providing that "if after the mak-

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ing of a will the testator shall marry, or if a child is born to the testator, and no provision is made in the will for such a contingency, such marriage or birth shall operate as a revocation of such will." It was held that the later statute did not apply, and that "as a rule of interpretation all statutes are so operated prospectively unless they contain language unequivocally and certainly retrospective." For the foregoing reasons we conclude there was no error in the judgment of the Superior Court.

In this opinion PARK, C. J., and PARDEE and BEARDSLEY, Js., concurred. CARPENTER, Js., dissented.

Effect of change in the law respecting the execution of wills.—In Hargroves v. Redd, 43 Ga. 142, cited in the principal case as contrary to the opinion there maintained, a testator by a will executed in 1852 directed certain of his slaves to be sent after his death to a free State and there to be emancipated, and bequeathed to them, when free, a certain portion of his estates. In 1859, the State of Georgia passed an act providing that emancipation in or out of the State by will was illegal and the will void. Subsequent amendments of the State and federal constitutions rendered the Act of 1859 obsolete at the time of testator's death. The question in this case was whether the Act of 1859 "revoked" the will, notwithstanding that its provisions were legal under the law at the time of testator's death. The court said: "Had this testator died while the Act of 1859 was in force....would the heirs-at-law have thought of setting up that it was revoked? The objection would have been, not that the intentions of the testator had changed, but that his intentions were illegal, and could not be set up. The will would have been void, not because it was not the expression of the testator's wishes, but because those intentions were illegal, and the courts could not permit them to be carried into effect."

Sutton v. Chenault, 18 Ga. 1, cited in the principal case and also in Hargrove v. Redd, 43 Ga. 142, is more in point. In it the paper in question was held no will, because the law, at the death of the testator, required a will to have three witnesses, the court saying that although it was lawfully executed when made, it did not become a will until the testator died, and that "in this view of the case, no retroactive is given to the statute. But it is held to apply because of force at the time the instrument became the testator's will."

In the case of Gilmore v. Shorter, 2 Mod. 310, where a special verdict was found upon the Statute of Frauds, which enacts that from and after the 24th day of June, in the year 1677, no action shall be brought to charge any person upon any person upon any agreement made in consideration of marriage, etc., unless such agreement be in

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writing; and the case being upon a bare promise without writing, judgment was given for the plaintiff, as "it could not be presumed that the act had a retrospect to take away an action to which the plaintiff was then entitled; for if a will had been made before the 24th day of June, and the testator had died afterwards; yet the will had been good, though it had not been in pursuance of the statute."

The case of Ashburnham v. Bradshaw, 7 Mod. 239, was upon a devise made before the Statute of George II., avoiding devises to charitable uses. The testator died after the statute was passed. Ten out of the twelve judges held that the land would still pass under the will; but they gave no reasons for their opinions.

In the case of Downs v. Townsend, Ambler, 290, Lord Hardwicke is reported to have said, that "the general rule as to testaments is, that the time of the testament and not the testator's death, is regarded"; but it is said that he was speaking of the intention of a testator as expressed in a specific bequest, and had no reference to the execution of the will."

In the matter of John Elcock's Will, 4 McCord, 39, the testator in 1823 made a will of personal property which was properly executed according to the law at that time. By an act of 1824, three witnesses were required to wills of personal property, and the testator died in 1825, leaving no other will than the one, which, having only two witnesses, was held void. This case recognizes the ancient distinction between wills of personal and wills of real property, the latter speaking only from the time of execution, while the former "carries all the goods which he had at the time of his death, although he may have acquired them after making the will."

In Houston v. Houston, 3 McCord, 491, the Court of Appeals of South Carolina said: "A distinction has always been made between a will by which land is devised and a testament containng bequests only of personal property. A devise of real estate is considered in the nature of a conveyance, and therefore can only operate upon lands of which the testator is seized at the time of executing the will. It would seem, therefore, that in the construction of such an instrument, relation must be had to the time of its execution. And yet, even in that case I am not prepared to say, that so far as regards its execution, it must be done according to the existing law at the time of the testator's death. But with regard to bequests of personal property * * * the will takes effect from the time of the death of the testator without regard to the time of its execution."

See also Giddings v. Turgeon, 5 Am. Prob. Rep. 201.

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COOK *vs.* WINCHESTER.

(81 Michigan, 581.)

ATTESTATION.—PRESENCE OF TESTATOR.

A will may be attested by witnesses "in the presence" of the testatrix, although it be physically impossible for her to see the witnesses in the act of signing.

APPEAL from a judgment of the Circuit Court of Kent County. The facts appear in the opinion.

Maher Felker for appellant.

Butterfield & Keeney and *Thompson & Temple*, for respondents.

MORSE, J. This controversy involves the validity of a will, the sole question being whether or not it was duly executed, or rather witnessed, under the laws of this State. There is no question of fraud or undue influence in the case, nor did the testatrix lack mental capacity to execute a will. It must be conceded from all the testimony in the case that the will was drawn by an honest, disinterested and trustworthy man; that he was the chosen instrument of Mrs. Page to draft it; that she had frequently consulted and advised with him before as to the disposition of her property, and had told him how she intended to bequeath it; that the will as made was just as she wanted it, and as she had long intended to make it; that it was read to her before she signed it and after she signed, at both of which times she expressed herself as fully satisfied with it; that she signed it in the presence of the persons who witnessed it, and that she requested them to witness it; that she asked them after it was executed if they had witnessed it, and received an affirmative answer, and was then shown their signatures, and their names were read over to her. If the will is not sustained, the property will certainly go, under the law, where she did not wish it to go. It is therefore the duty of the

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courts to uphold it if possible. It is claimed that the requirements of our statute were not complied with in the witnessing of this will. The statute provides (How. St. § 5789) that three things are requisite to the validity of a will: 1. That it shall be in writing; 2. That it shall be signed by the testator, or by some person in his presence, and by his express direction; 3. That it shall be attested and subscribed in the presence of the testator, or by two or more competent witnesses.

The will was drawn by James Toland, supervisor of the Township of Byron, Kent county, who lived only a few rods from Mrs. Page, and with whom she had frequently talked about making her will, and how she wished it drawn. On June 30, 1888, she sent for him. Mrs. Page had been an invalid for many years, and at this time was confined to her bed, and unable to leave it without help. Toland found her in a bedroom adjoining, and opening by a door into, the kitchen—a kitchen bedroom,—which communicated with no other room. He asked Mrs. Page, who said that she was ready to make her will, and wished him to draw it, if she wanted it drawn in the same manner as she had before told him to draw it. She said, "Yes," and he proceeded. There was no table in the room where Mrs. Page was, and he drew the will on a table in the kitchen. This table was near the bedroom door, but when the door was open it was impossible for any one lying squarely on the bed to see the table or any one sitting at it. Mrs. Page could not move in bed, and was not able to see the table. Toland drew the will, and took it into the bedroom, and read it to Mrs. Page. She was satisfied with the will. Not being able to handle a pen very well, she requested Toland to write her name. He went to the kitchen table and wrote it. He then came in, and she made her mark. Three ladies were present in the room, Mrs. Weaver, Mrs. McConnell, and Mrs. Miller. Mrs. Page requested Mrs. Weaver and Mrs. McConnell to witness the will. Mrs. Weaver did not wish to sign it for some reason, and Mrs. Page then signified that she wished Mrs. Miller to wit-

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ness it. Mrs. Miller and Mrs. McConnell then stepped into the kitchen and signed the will as witnesses. Mr. Toland and the witnesses then went into the room again, and Toland read the will over to her again, and asked her if it suited her. She said it was all right,—just as she intended it should be. Toland showed the names of the witnesses to her, and also read them to her. He testified that previous to his showing it to her she asked the witnesses if they had signed it, and they told her they had. The door was open between the kitchen and bedroom when the witnessing was done. Mrs. Miller's testimony agrees with Toland, except she says that she stood in the door when the will was being read over after the witnesses had signed it, and did not hear Mrs. Page ask her or Mrs. McConnell if they had signed as witnesses, but heard Toland tell her that they had witnessed the will, and read their names to her. Mrs. McConnell (now Mrs. Merritt) states that when they went back into the bedroom after witnessing the will, and Toland read it all over to Mrs. Page again, she said it was all right, and just as she wanted it; the witnesses and everything were all right. "She asked me if we had signed it, and I told her we had. Mrs. Miller and Mr. Toland were there." The room in which Mrs. Page was lying was eight feet square. The kitchen was about fifteen feet square. The distance from where the witnesses sat while signing the will to the bed of Mrs. Page was about twelve feet. The will was denied probate by the judge of probate of Kent county, and on appeal to the circuit court his action was affirmed.

It is claimed that the will was not executed—witnessed—in the presence of the testatrix. It is true that it was physically impossible for her to see the witnesses when they were in the act of signing it without moving herself upon the edge of the bed, which she was unable to do. And it is argued by counsel for the contestants that there are no cases to be found in the books, except possibly two, which can be claimed as authority for the admission of the will to probate. That

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the statute has been uniformly held to require that—"The condition and position of the testator when his will is attested, and in reference to the act of signing by the witnesses, and their locality when signing, must be such that he has knowledge of what is going forward, and is mentally observant of the specific act in progress, and, unless he is blind, the signing by the witnesses must occur where the testator, as he is circumstanced, may see them sign if he choose to do so. If in this state of things some change in the testator's posture is requisite to bring the action of the witnesses within the scope of his vision, and such movement is not prevented by his physical infirmity, but is caused by an indisposition or indifference on his part to take visual notice of the proceedings, the act of witnessing is to be considered as done in his presence. If, however, the testator's ability to see the witnesses subscribe is dependent upon his ability to make the requisite movement, then if his ailment so operates upon him as to prevent this movement, and on this account he does not see the witnesses subscribe, the will is not witnessed in the presence." *Aikin* v. *Weckerly*, 19 Mich. 504, 505. A large number of cases are cited in support of the counsel's claim, to wit: *Manderille* v. *Parker*, 31 N. J. Eq. 242; *Wright* v. *Manifold*, 1 Maule & S. 294; *Reynolds* v. *Reynolds*, Speers, 253; *Robinson* v. *King*, 6 Ga. 539; *Brooks* v. *Duffel*, 23 Ga. 441; *Reed* v. *Roberts*, 26 Ga. 294; *Jones* v. *Tuck*, 3 Jones, (N. C.) 202; *Eccleston* v. *Petty*, Carth. 79; *Broderick* v. *Broderick*, 1 P. Wms. 239; *Lamb* v. *Girtman*, 33 Ga. 289; *Neil* v. *Neil*, 1 Leigh. 6; *Orndorff* v. *Hummer*, 12 B. Mon. 626; *In re Downie's Will*, 42 Wis. 66; *Duffie* v. *Corridon*, 40 Ga. 122; *Edelen* v. *Hardey's Lessee*, 7 Har. & J. 61; *Russell* v. *Falls*, 3 Har. & McH. 457; *Graham* v. *Graham*, 10 Ired. 219; *In re Cox's Will*, 1 Jones, (N. C.) 321; *Ragland* v. *Huntingdon*, 1 Ired. 561; *Chase* v. *Kittredge*, 11 Allen, 49; *Compton* v. *Mitton*, 12 N. J. Law. 71; *Combs* v. *Jolly*, 3 N. J. Eq. 625; *Mickle* v. *Matlack*, 17 N. J. Law, 86; *Hindmarsh* v. *Carlton*, 8 H. L. Cas. 160.

It must be conceded that these cases all fully support

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the contention that the will must be witnessed in the same room with the testator, or, if out of the room, where he can see them sign if he desires to do so, he must be in a position where it is possible to see them. The fact that the will after being witnessed out of the testator's sight, is brought to the view of the testator, and he looks upon the signatures of the witnesses, and they then acknowledge the witnessing of it before him, will not cure this defect in its execution, according to the authority of some of these cases. See *Chase* v. *Kittredge*, 11 Allen, 61; *In re Cox's Will*, 1 Jones, (N. C.) 321; *Graham* v. *Graham*, 10 Ired. 219; *Russell* v. *Falls*, 3 Har. & McH. 457; *Lamb* v. *Girtman*, 33 Ga. 289; *In re Downie's Will*, 42 Wis. 66.

The extreme rule laid down in some of these cases cited by counsel for contestants, notably *Graham* v. *Graham*, *supra*, a North Carolina case, was criticised, and I think justly so, by Justice CHAMPLIN in *Maynard* v. *Vinton*, 59 Mich., at pages 148, 149, and 26 N. W. Rep., at pages 405, 406, but for the purposes of that case the doctrine of *Aikin* v. *Weckerly* was adhered to. In *Maynard* v. *Vinton* the testatrix was in a position where she might have seen the witnesses sign, as they were within the range of her vision, if she saw fit to look, as was also the case with the testator in *Aikin* v. *Weckerly*. The precise question raised by the record in this case has never been presented to this court, and neither of the two cases above mentioned seem to stand in the way of a just and liberal construction of the statute in this case in favor of the validity of the execution of this will of Alzina Page. I agree with Judge CHAMPLIN that "presence," as used in the statute, has been too narrowly construed by many of the courts as meaning that the witnesses must be under the eye of the testator. I find two cases referred to on the argument where the facts are almost identical with those found by the circuit judge in this case, and in both of which the will was sustained. In the first, *Sturdivant* v. *Birchett*, 10 Grat. 67, the will was attested by the witnesses subscribing their names as such in

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a different room from that in which the testator was lying at the time of such signing. The testator could not see the witnesses in the act of signing, either from the bed on which he lay or from any other place within the room. The testator signed the will in the presence of the witnesses, and requested them to attest it. They went together into another room for that purpose, it being inconvenient to do so in the room where the testator was lying. When they subscribed their names no other person was in the room, and they immediately returned to the room where the testator was. They were gone from that room not over two minutes. They took the will to the testator, who was lying in bed, and, both of the witnesses being together, one of them said to him, "Mr. Sturdivant, here is your will witnessed;" at the same time pointing with his finger to the names of the witnesses, and holding the will open before him, the names of said witnesses being on the same page, and close to that of the testator. He took the will in his hands, and looked at it as if he was examining it. He then closed or folded it. On being told that he was ill, and had better give the will to some one to keep for him, he asked whether if he got well he could take it back from the person to whom he might give it. Being answered in the affimative, he said: "It is my will, and I wish it to stand, but I may hereafter, on getting well, wish to make some slight alteration in it." He then handed the will to a friend. In the other case of *Riggs* v. *Riggs*, 135 Mass. 238, (decided June 21, 1883,) the witnesses to the will saw the testator sign it, and were in the room with him at the time. They signed it as witnesses in a room adjoining the one testator was in, and at a distance of about nine feet from him, the door being open. The testator was in bed and in such a position that if he had been able to turn his head round he might, by so turning it, have seen the witnesses when they signed their names, and also the will itself, unless during a part of the time when their bodies obstructed the view; but from the effect of an injury which he

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had received he could not in point of fact turn his head sufficiently to see them and the will at the time when they were signing their names as witnesses. After the witnesses had signed the will it was handed to the testator as he was lying upon the bed, and he read their names as signed, and said that he was glad that it was done.

These cases differ from the one at bar only in the fact that the will was taken, after witnessing, into the hands of the testator, who in one case looked at it, and in the other read the names, while in Mrs. Page's case the names were shown her while the will was in the hands of the scrivener, and read to her, as well as the names of the witnesses to it. The difference is unimportant. In all three of the cases the maker of the will knew what he or she was doing, and what was being done, being conscious of all that took place, and no claim of fraud is made or entertainable in any of them. The majority of the Virginia supreme court (three out of five judges) sustained the will in the first case, and held that the statute was substantially complied with, in a very able and exhaustive opinion by Justice LEE. In his opinion the learned justice shows conclusively from the authorities that the words "in presence of" do not necessarily imply that the testator and the witnesses must be in the same room, nor that actual sight or inspection of the process of signing is peremptorily required, because it is well settled that a blind man may make a will. He holds that the recognition by the witnesses of their signatures to the will made within the immediate sight and presence of the testator, immediately after they have signed it in an adjoining room, furnishes as complete a security against the frauds and impositions sought to be guarded against by the statute as the actual manual operation of writing their names by the witnesses under his eye. The identity of the witnesses is also equally assured in both modes. In the Massachusetts case the court was unanimous in sustaining the will. In referring to the holding by some of the courts that an attestation was insuf-

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ficient when the testator did not and could not see the witnesses subscribe their names, Chief Justice MORTON, speaking for the court, says: "We are of opinion that so nice and narrow a construction is not required by the letter, and would defeat the spirit, of our statute." * * * * "The statute does not make the test of the validity of a will to be that the testator must see the witnesses subscribe their names. They must subscribe 'in his presence,' but in cases where he has lost or cannot use his sense of sight, if his mind and hearing are not affected, if he is sensible of what is being done, if the witnesses subscribe in the same room, or in such close proximity as to be within the line of vision of one in his position who could see, and within his hearing, they subscribe in his presence. * * * In a case like the one before us, there is much less liability to deception or imposition than there would be in the case of a blind man, because the testator, by holding the will before his eyes, could determine by sight that the will subscribed by the witnesses was the same will executed by him. * * * The door was open, and the table was within the line of vision of the testator, if he had been able to look, and the witnesses were within his hearing. The testator could hear all that was said, and knew and understood all that was done; and, after the witnesses had signed it, * * * it was handed to the testator, and he read their names as signed, and said he was glad it was done. For the reasons before stated, we are of opinion that this was an attestation in his presence, and was sufficient."

So, in this case, the witnesses were in the line of the testatrix's vision if she could have moved to one side of the bed, which she could not do, as in the Massachusetts case the witnesses were in the range of the testator's vision if he could have turned his head, but he could not. I am better satisfied with the liberal construction of the statute and the reasoning of these two cases than I am with the authorities cited to the opposite, and sustaining the "nice and narrow" interpretation of the statute; and in the case at bar such

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holding, as it will in most cases, reaches the justice and equity of the case, which adds to my satisfaction. No fraud was perpetrated, and none well could have been, under the circumstances of the execution of this will. But, in holding the will invalid, a fraud is committed upon the testatrix, as well as her chosen beneficiary, by the law, and her property is disposed of contrary to her wish and intention, to those from whom she sought to keep it away. It is not the purpose or province of the law to do this when it can be avoided. In the definition of the phrase "in the presence of" due regard must be had to the circumstances of each particular case, as it is well settled by all the authorities that the statute does not require absolutely that the witnessing must be done in the actual sight of the testator, nor yet within the same room with him. If, as before shown, they sign within his hearing, knowledge and understanding, and so near as not to be substantially away from him, they are considered to be in his presence.

But we hold that the execution of this will was valid expressly upon the ground that not only was the act of signing by the witnesses within the hearing, knowledge, and understanding of the testatrix, but after such signing the witnesses came back into the room where she was with the will, which was on one sheet of paper; that the will was then again all read over to her by the scrivener, and the names of the witnesses read to her and their signatures shown to her, and she informed by the witnesses, or one of them in the presence of the other, that the will had been signed by them; and that she then said it was all right, "just as she wanted it; witnesses and everything was all right." This seems to us to have been a substantial compliance with the statute, and a witnessing in the presence of the testatrix. The circuit judge returns in his findings of fact that his decision was based entirely on the ground that the will was not properly witnessed under the statute; that, the will not being admitted in evidence for this reason, the case proceeded no further, the proponent

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taking an exception, and resting. The contestants announced that they were prepared to show that the testatrix was incompetent to make a will. The judgment of the circuit court will be reversed, and a new trial granted.

The other justices concurred.

See as to the presence of the testator, Manderville v. Parker, 1 Am. Prob. Rep. 106, and the monographic note.

SUMMERS *vs.* SMITH.

(127 Illinois, 645.)

CONSTRUCTION.— EXECUTORY DEVISE.— DYING WITHOUT HEIRS OF BODY.—SURVIVORS.

A fee determinable upon death of devisee without heirs of his body, with a devise over to his surviving brothers or brother, may be sustained as an executory devise; and the gift over is not too remote when made to the survivors of a class of which the first devisee is a member.

APPEAL from a decree of the Circuit Court of Scott County.

Mr. Oscar A. De Leuw and *Mr. James Callans*, for the plaintiffs in error.

Mr. James M. Riggs and *Mr. James A. Warren*, for the defendants in error.

SCHOLFIELD, J. The question here is, what is the proper construction of certain clauses of the last will and testament of William Smith, the elder, late of Scott county, deceased. One of the clauses is as follows: "I give and bequeath to my dear wife, Martha Ann Smith, my homestead comprising all that tract or parcel of land on which I now live, and described as follows:

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* * * It is my will that my said wife shall have and hold the above-described lands * * * during her natural life, to her use and benefit." Then follows a gift of personalty, including stock on the farm, household goods, etc., to his wife for her life, after which is the following clause: "It is further my request, that after the natural death of my said wife, Martha Ann Smith, that the homestead, comprising the above-described lands bequeathed to her, my said wife, during her natural life, shall go to my youngest son, Westley Clark Smith, to have and to hold to my said son and his heirs forever. The above-described personal property, at the decease of my wife, is to be equally divided among my three sons, except the household furniture, which she may divide among my daughters." This is followed by a devise of a farm to his son William, the younger, a bequest of money to buy a farm for his son James M., and bequests to his four daughters respectively, and then occurs the following clause: "It is further my will, in case any of my sons to whom I have bequeathed property in this my last will and testament should die without heirs of his body, the real estate I have bequeathed to him shall go to his surviving brothers or brother, and the personalty to all the other heirs equally." The testator died in February, 1850. Westley Clark Smith died in 1868, without heirs of his body. The court below decreed that the lands given to Westley Clark Smith vested in fee, upon his death, in his surviving brothers. Plaintiffs in error contend the decree should have been that they vested in fee in his heirs at law.

If the clause giving the homestead, after the death of the wife to Westley Clark Smith and his heirs forever, were alone to be considered, it is clear that he would take a fee, but that clause cannot be considered alone. The intention of the testator is to be ascertained from the whole will and all its parts taken together. (*Hamlin* v. *United Express Co.*, 107 Ill. 443.) We must therefore read the clause last quoted as if it were immediately subjoined to this clause, and, so reading it, the first

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question is, whether the words, "in case any of my sons to whom I have bequeathed property in this my last will and testament, should die without heirs of his body," etc., must be construed as meaning should die within the lifetime of the testator, or simply, should die at any time, without heirs of body. There may be found cases seeming to sanction the construction of the first alternative, but the English rule now accepted is, when the death of the first taker is coupled with circumstances which may or may not take place, as for instances, death under age or without children, the devise over, unless controlled by other provisions of the will, takes effect, according to the ordinary and literal meaning of the words, upon death, under the circumstances indicated, at any time, whether before or after the death of the testator. *O'Maloney* v. *Burdett*, L. R. 7 H. L. Cases, 408; (12 Eng. R. Moak's Notes, 22); *Ingram* v. *Soutten*, L. R. 7 H. L. 408, (12 Eng. R. Moak's Notes 40); *Olivant* v. *Wright*, 24 W. R. 84; *Britton* v. *Thornton*, 112 U. S. 526, 5 Sup. Ct. Rep. 291; 3 Jarman on Wills, (Randolph & Talcott's ed.) 640. See, also, note "o" on same page; *Crane* v. *Cowell et al.*, 2 Curtis, 178. The other provisions of the will instead of controlling this view, corroborate and sustain it, and tend rather to show that death in the lifetime of the testator was not within contemplation at all, for otherwise some different provision would have been made for the division of the personal property when distributed at the death of the wife. The clause of the will providing for distribution upon the death of the wife clearly contemplates that the three sons will be alive at that time, for it says, "the personal property is to be equally divided among my three sons," and so, necessarily, the death contemplated, in the event of which, without heirs of his body, the real estate is devised over to the surviving brothers or brother, and "the personalty to all the other heirs equally," must have been subsequent to that distribution. The devise to Westley Clark is plainly of a fee, determinable upon his dying without heirs of his body. (4 Kent's Com. 8th ed.) 8,* 9; *Fried-*

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man v. *Steiner*, 107 Ill. 125; *Hawley et al.* v. *Northampton*, 8 Mass. 3.) And since, at common law, a fee could not be limited upon a fee, the devise, in the event of the death of Westley Clark without heirs of his body, "to his surviving brothers or brother," if it can be sustained, must be as an executory devise, and the only question in that respect which occurs to us as feasible, is whether the limitation is void because the contingency upon which it is to take effect is too remote. Many cases may be found in which it has been held that a devise in fee with a remainder over if the devisee dies without issue or heirs of the body, is a fee, cut down to an estate tail, and that the limitation over is void by way of executory devise, as being too remote and founded on an indefinite failure of issue.

But it has been held by some courts, and, as we think, with sufficient reason, that where the devise over is to the survivor or survivors of a class to which the first devisee belonged, as for instance, as here, to surviving brothers, it necessarily must mean a devise to a person in being at the death of the first devisee, and so relieve the devise over of the objection of indefinite remoteness. *Fosdick* v. *Cornell*, 3 Johns, 440; *Moffat's Executors* v. *Strong*, 10 Id. 11,* 12; *Anderson* v. *Jackson*, 16 Id. 382; *Chrystie* v. *Phyfe*, 19 N. Y. 345; *Jackson* v. *Chew*, 12 Wheat. 163; *Lewis* v. *Claiborne*, 5 Yerg. 369; *Turner* v. *Ivie*, 5 Heisk. 232; *Lippett* v. *Hopkins*, 1 Gall, 460. There is, moreover, in our opinion, a reason sustaining this view, in this State, which does not exist where, as at common law estates tail are recognized. We have no estates tail, but, on the contrary, where an instrument is executed which would at common law, be held as vesting an estate tail, our statute declares it shall only vest a life estate in the grantee or donee in tail, and the remainder in fee in the designated heir or heirs. Rev. Stat. 1874, chap. 30, sec. 6. It would, then, seem that it violates the plainest principles of construction, to hold that language in a will which can only vest a life estate in the first taker, and a remainder in fee in the next, was intended to vest

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an estate tail, merely because if that language had been employed where estates tail are recognized it would have vested such an estate. It does not have that effect here, and in the absence of anything appearing to the contrary, language must be presumed to have been intended to have the legal effect which the law assigns to it. So, therefore, here, "dying without heirs of body" could only mean dying without leaving such heirs of body as the estate would have vested in, in fee, instantly, upon the death of the first devisee,—as children, etc. *Lewis* v. *Claiborne*, and *Turner* v. *Ivie*, *supra*.

If it was intended that a person in being was to take immediately upon the death of the first devisee, as the use of the words "surviving brothers or brother" indicates, or if it was intended that the words "heirs of body" meant such heirs of body as would have taken the estate in fee immediately upon the death of the first devisee, the ruling below is right. In either view, it is practically the same as if the will had said without leaving children or descendants of children surviving him. It is always competent to show that the words "heirs," or "heirs of body," are used in a will as synonymous with "children," and, for this purpose, every part of the will is to be taken into consideration. (*Jones* v. *Miller*, 13 Ind. 337; *Hileman* v. *Bonslaugh*, 13 Pa. St. 344; *Hill* v. *Hill*, 74 Id. 173.) And even at common law a devise over to survivors in the event of the devisee dying without children is not void. *Hughes* v. *Sayer*, 1 P. Wms. 535; *Morgan* v. *Morgan*, 5 Day, 517; *Den* v. *Schenk*, 3 Halst. 29.

The decree is affirmed.

As to the construction of the word "survivors," see Gorham v. Betts, 6 Am. Prob. Rep. 141, and the monographic note, and also Outcalt v. Outcalt, 5 Am. Prob. Rep. 272.

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HUGHES *vs.* NICKLAS.

(70 Maryland, 484.)

THE RULE IN SHELLEY'S CASE.—LEASEHOLDS.

The rule in Shelley's Case is a rule of property and not one of construction. It prevails over the manifest intention of the testator; and is applicable alike to leasehold and to freehold property.

APPEAL from a decree of the Circuit Court of Baltimore City. The opinion discloses the facts.

Wm. E. Hoffman, for the appellant.

Peter J. Campbell and *C. D. McFarland*, for the appellee.

MCSHERRY, J., delivered the opinion of the court. The single question involved in this appeal is, what estate did Jane Shaw take, under the will of George Ackerman in certain leasehold property? It is insisted by the appellant that she took an absolute interest therein; whilst the appellee contends that she was entitled only to a life-estate, and that upon her decease the remainder passed to Christiana Snyder. The will of George Ackerman must determine this controversy. It bears date May 16, 1831, and was admitted to probate October 28, 1834. The only clauses which have any reference to the question before us are in the following words: "And to my adopted child, Jane Shaw, whom I have raised from infancy, and who now lives with me, I give and bequeath all my property, consisting of houses and vacant lots, situate on the west side of High street, between York and Pitt streets, in the City of Baltimore, during her natural life with remainder over to the heirs of her body, if she should have any, but, in case she should die without such heirs, then the said remainder to my cousin, Christiana Snyder, widow as aforesaid, to her and her heirs forever." "And I give all the residue of my property, of whatsoever name or nature, to the said Jane Shaw, without

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limitation or restriction," etc. It is conceded that the property referred to in the first of the two clauses quoted was leasehold property. Jane Shaw married William Campbell. She died in 1886 without ever having had issue. She left a last will and testament, whereby, after making small bequests to other persons, she gave the residuum of her estate to John W. Hughes, a grandson of her deceased husband, and she appointed him executor. He is the appellant in this case. Christiana Snyder also died, leaving a will by which she gave the residuum of her estate to her grandchildren. The appellee is administrator *d. b. n., c. t. a.* of her estate.

It has been argued that the intention of George Ackerman, apparent on the face of the will, was to give Jane Shaw merely a life-estate in the leasehold property, and that this intention must control the construction to be placed on the language used in making the bequest of that property to her. It is undoubtedly true that a testator's intention, when legally manifested, will be given effect to, unless it violates some fixed principle of law, or would, if gratified, break down some settled rule of property, or unless it be defeated by the use of technical words whose meaning, when they are found in wills, is inflexible and unvarying. For instance, no matter how clear may be the intention to create a perpetuity, it cannot be gratified, because forbidden by law; and, even though the intention to give but a life estate may be perfectly evident, yet, if, in attempting to create it, words have been employed which have invariably been held to carry the fee, the fee and not a mere life estate, will pass. There is, perhaps, no rule of property more deeply rooted in the jurisprudence of this State than that which is known as the rule in *Shelley's Case*. It is a rule of tenure which is not only independent of, but generally operates to subvert, the intention; and so firmly is it, with its qualifications established here, that, as said by this court in *Shreve Wife* v. *Shreve et al.*, 43 Md. 394, "nothing but an Act of the Legislature can strike it out of our system of real law." The definition of the rule given by

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Mr. Preston, (1 *Preston on Estates*, vol. 1, p. 263,) adopted with slight modifications by Chancellor Kent, (4 Kent, Comm. 215,) and quoted with approval in *Ware, et al.*, v. *Richardson*, 3 Md. 544, is so familiar that it need not be repeated in this opinion.

If the subject of the gift to Jane Shaw had been real estate, she would have taken, under the rule, an estate in *fee tail*, which by the operation of our law of descents would have been converted into an estate in fee simple, notwithstanding the most positive and unequivocal declaration that she should take only an estate for life. But it is supposed a different result must follow in this case because the gift relates to personal property. In support of this position our attention has been called to the cases which hold that in respect to personal estate attention is paid to any circumstance that seems to afford ground for construing a limitation after dying without heirs or without issue, to mean a dying without heirs or issue living at the death of the party, in order to support a bequest over, though as to real estate the construction is generally otherwise. *Wallis* v. *Woodland*, 32 Md. 104; *Gable* v. *Ellender*, 53 Md. 311. But the principle which strikes down, as void because too remote, a limitation in remainder after an indefinite failure of issue, is not the one upon which the rule in *Shelley's Case* is founded, nor upon which the decision of the case before us depends. If the rule in *Shelley's Case* is applicable to leasehold estates as well as to a freehold, the case is entirely free from difficulty. In *Butterfield* v. *Butterfield*, 1 Ves. 154, the testator directed that £400 should be put out on good security for his son T., that he might have the interest of it for his life, and for the lawful heirs of his body, and if it should so happen that he should die without heirs of his body, it should go to his youngest son, B., Lord HARDWICKE held that the son T., should take the whole absolute interest. In *Garth* v. *Baldwin*, 2 Ves. 646, personal property was limited to trustees to pay the profits to Edward Turner Garth for life and afterwards to pay the same to the

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heirs of his body. The Lord Chancellor held that the case was reduced to this, a gift of personal estate to one for life and the heirs of his body—that must vest the property in him, whether the testator intended it or not. In *Atkinson* v. *Hutchinson*, 3 P. Wms. 259, the Lord Chancellor stated that if a term of years be limited to A. for life, remainder to the heirs of his body, A. would take the whole interest. In *Elton* v. *Eason*, 19 Ves. 78, the Master of the Rolls said: "It is clearly settled that a bequest of personal property to a man for life, and afterwards to the heirs of his body, is an absolute bequest to the first taker. Whatever disposition would amount to an estate tail in land, gives the whole interest in personal property; which is incapable of being entailed." And in *Horne* v. *Lyeth*, 4 Har. & J. 431, which, though not a decision by the Court of Appeals, has been followed and approved in many cases by this Court, it was distinctly determined "that, if a leasehold estate is limited to one for life the remainder to the heirs of his body, the whole interest vests in the first taker, and that the words 'for life' will not be sufficient to restrict his interest to a life estate." This was recognized in *Warner et al.*, v. *Sprigg et al.*, 62 Md. 14.

It would seem, then, to be perfectly clear that the bequest to Jane Shaw is, by analogy at least, directly within the rule. The gift is of a leasehold interest to Jane Shaw during her natural life, with remainder over to the heirs of her body, if she should have any, as a class of persons to take in succession from generation to generation. The limitation to the heirs entitled her to the absolute interest, which was not restricted by the words "if she should have any" heirs. The second clause quoted from the will cannot affect this conclusion. It is claimed its provisions plainly indicate that the testator intended to give Jane Shaw only a life estate under the first clause; but even if this should be conceded, the result would not be changed, because, no matter how evident the intention to create but a life estate may be, when the words actually used bring the gift within the rule the intention must give way, and

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the fixed rule must be followed. Accordingly, Hughes, who claims under the will of Jane Shaw, is entitled to the estate, and the funds brought into court, being the rent due by the lessee of the term, are payable to the appellant. There was error, therefore, in the decree below, which denied the appellant's right to these funds, and it must be reversed. The cause will be remanded, that a decree may be passed in conformity with this opinion.

Decree reversed and cause remanded.

See, Leathers v. Gray, 6 Am. Prob. Rep. 72, and the cross-reference note.

IN RE LAYMAN'S WILL.

(40 Minnesota, 371.)

TESTAMENTARY CAPACITY.—BURDEN OF PROOF.—WITNESSES.—ATTORNEY AND CLIENT.—PRIVILEGED COMMUNICATIONS.

Under the statutes of Minnesota, (sections 15-17, Gen. St. 1878,) the burden of establishing the sanity of a testator is upon him who offers the will for probate.

This view of the statute does not necessarily change the common practice, whereby the proponent first makes out a *paifcre mia* case, the contestant then introducing evidence of insanity, leaving to proponent the privilege of again submitting testimony as to the testator's soundness of mind.

Upon the trial of an appeal from an order admitting a will to probate, an attorney at law, who had been the legal adviser of the testator, was permitted to disclose communications made to him by the deceased in his lifetime upon business matters, and the advice and counsel given thereon. The object of the testimony was to lay a foundation for the admission in evidence of the opinion of said attorney as to the sanity of the testator, and there was nothing in the testimony which in any manner reflected upon the character or reputation of the deceased. *Held*, that the contestant, who was one of the heirs at law of the deceased, could not be permitted to exclude such testimony by invoking the rule of privileged communications.

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APPEAL from an order of the District Court of Hennepin County, denying a motion for a new trial.

Hart & Brewer, for appellant.

Wilson & Lawrence and *R. W. Laing*, for respondents.

COLLINS, J. But two questions are presented for our consideration upon this appeal: *First.* Did the trial court err in admitting certain testimony of the witness Laing, objected to by the contestant on the ground that it was incompetent and inadmissible, by reason of Gen. St. 1878, c. 73, § 10? *Second.* Did the court err in charging the jury that the burden of proof was upon the contestant, and that she must show by a preponderance of testimony the loss or absence of the mental capacity required by statute to make a will?

The principal question in this case seems to have been as to the sanity of the deceased when he executed the instrument offered for probate, and alleged by the proponents to be his last will and testament. The witness Laing was an attorney at law, and had prepared the will in question. He had also served the decedent in other matters as his legal adviser. In this way he had acquired some knowledge of the mental condition of the deceased, and was more or less qualified to express an opinion as to his sanity. Under the rule laid down in the case of *Pinney's Will*, 27 Minn. 280, (6 N. W. Rep. 791, and 7 N. W. Rep. 144,) that a non-expert must first disclose the facts upon which his opinion may be predicated before he can be allowed to express one upon the question of soundness of mind, the witness stated his professional connection with the testator for quite a period of time before his death, including the day upon which the will was drafted and signed, and also testified that he had many conversations with him, always upon legal business. He was then permitted, the contestant objecting, to narrate the details of the business which was transacted, what the deceased counseled the witness about, what he

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said, and what advice and counsel he was given by the attorney. The full particulars of one or two interviews, in no manner connected with the making of the will, were related to the jury. These communications between the decedent and his attorney were privileged at common law as well as by statute, the object of the rule being the protection of the client and his estate. And while many text writers assert emphatically that the seal of secrecy remains forever, unless removed by the party himself, there is an abundance of authority for saying that, upon the decease of the only person who could, in his lifetime, exercise the privilege of waiver, the rule should not be so perverted by a strict adherence to it as to render it inconsistent with its objects and thus bring it into direct conflict with the reason upon which it is founded. *Russell* v. *Jackson*, 15 Jur. 1117; *Blackburn* v. *Crawfords*, 3 Wall. 175; *Groll* v. *Tower*, 85 Mo. 249. The object of the rule, so far as it relates to this class of communications, being the protection of the estate, there remains no reason for continuing it when the very foundation upon which it proceeds is wanting.

The testimony called for was quite necessary in order to determine the weight which ought to be given the witness' opinion as to the mental condition of the testator, and his disclosures in no way reflected upon the character or reputation of the deceased. The testimony when given served to protect the estate, and tended to aid in a proper disposition of it. The issue in the case was as to the mental soundness of a person under whom each litigant claimed, and, whatever the result, the interest and the estate of the deceased were not prejudicially affected. It is not an action in which the success of an adverse third party must prove detrimental to the property. Neither of these litigants can be permitted to invoke the rule respecting privileged communications for the purpose of excluding material and important evidence of the character above described upon the only question involved in the dispute, namely, the sanity of the deceased. The testimony of the witness Laing was properly received.

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At common law the legal presumption is that every man is of sound mind, and the burden of proof that he is not rests upon the party asserting the existence of an unnatural condition of the mind of the person whose act or condition is questioned, and the presumption that every one is considered and treated as *compos mentis*, in absence of proof to the contrary, prevails in this state, unless it is manifest from our statutes (chapter 47 Gen. St. 1878,) that a different rule has been prescribed when the question of the exercise of testamentary capacity is involved.

We have three sections of said chapter 47 which specify the proof required when a will is offered for probate. In section 15 the method is laid down, in case there is no contest. The court may, in its discretion, dispense with all but one of the subscribing witnesses. One, however, must testify to the execution of the will, and the sanity of the testator, and this is imperative. Section 16 authorizes the court, in its discretion, to permit proof of execution of the will, and the sanity of the decedent, by other witnesses, in case none of the subscribing witnesses reside in the State; but there must be proof of the sanity of the testator, and of his handwriting, as well as proof of the handwriting of the witnesses. The next section (17) is peremptory in its provisions, and declares that no will shall be effectual in the probate court nor in the district court upon appeal, unless proved and allowed in the exact manner prescribed in said sections 15 and 16, which are the only sections of the chapter in which we discover any rules for the guidance of the courts in the matter of proof. We find, therefore, the duty imposed upon the probate court by section 15 to secure the testimony of at least one of the subscribing witnesses in all cases, and without regard to a contest. By the next section the court is permitted, in its discretion, to hear testimony of the same import, but from other than the subscribing witnesses; while section 17 expressly and emphatically provides that unless testimony is received of the proper execution of the alleged will and

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of the sanity of the deceased when executing it, it shall not be effectual to pass either real or personal estate. The question now under discussion is not new in the English and American courts, and has caused much contention with varying and diverse results; one class of authorities being to the effect that the common law presumption of sanity prevails, the other that, as wills are usually executed in sickness or old age, frequently *in extremis*, the general presumption does not obtain, and the *onus* remains with the proponent until the end. A majority of this court are of the opinion that by the use of the language found in the sections before mentioned, (which is peculiar to the statutes of this State) the legislators intended to fall in line with and adopt the class of cases last referred to; to declare that the burden of proof is upon the proponent, and that unless it is affirmatively made to appear that the instrument offered for probate was properly executed by a competent person, the administration provided by law for the estates of those dying intestate, must prevail.

It may be said, in conclusion, that, if the presumption of sanity exists at any time during the proceedings, it is not at the outset, and that it would be surprisingly incongruous to conclude that such a presumption should not have its legitimate effect in the first instance, as well as in the final result. We may also add that our views upon this question do not necessarily change the convenient and perhaps prevailing practice whereby the proponent first makes a *prima facie* case, then the contestant introduces evidence of insanity, giving to proponent the privilege of again submitting testimony as to the testator's soundness of mind. As the charge of the court upon this point was erroneous, a new trial must be granted.

Judgment reversed.

See further as to the burden of proof in an issue of testamentary capacity, Chrisman v. Chrisman, 6 Am. Prob. Rep. 156, and the monographic note thereto. As to undue influence, see, Mitchell v. Mitchell, 7 Am. Prob. Rep. 170, *infra*.

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BROWN *vs.* BROWN.

(42 Minnesota, 270.)

ELECTION.

A testatrix, who had been the owner of one entire city lot, conveyed by deed one-quarter thereof to one of her sons. Afterwards, by will, she devised the entire lot, including that portion thereof previously conveyed by her, to her three sons, including the grantee in the deed referred to, share and share alike. Upon the probate of the will, *held* that such grantee was required to elect whether he would relinquish his own property and take under the will; and that, if he elected to retain his own property and against the will, he was not entitled to a partition of the remaining three-fourths of the lot, but equity will appropriate the gift made by the will to him, to compensate the other beneficiaries under it.

APPEAL from an order of the District Court of Ramsey County. The opinion discloses the facts.

Warren H. Mead, for appellants.

John D. O'Brien, for respondents.

VANDERBURGH, J. The record shows that Mrs. Mary Brown, widow, the testatrix named in the pleadings, occupied under contract of purchase, from 1869 to November 15, 1881, the town or city lot in controversy here, described as lot 4, in Whitacre, Brisbine & Mullen's subdivision of lots 1 and 2 of Leech's out lots to St. Paul, and at the last-named date received a deed therefor, and on the same day executed a deed of conveyance of the east half of the north half thereof to the plaintiff, who, with the defendants Patrick and James Brown, were her sons, residing with her upon the same lot. Plaintiff built a house upon the quarter lot so conveyed to him, and has since resided therein with his family. Mary Brown died testate in the year 1884. By her will, she devised to her three sons above named the lot so conveyed to her, share and share alike.

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Her purpose to devise the whole lot to them is apparent from the language of the will, in which the lot is accurately described according to the plat, and as the lot on which she was then living. The will also refers to her three sons, "Patrick, James and John, who are with me, and have cared for me at their joint expense. It is just and proper that Patrick, John and James shall have the lot on which I am now living, and such is my judgment and will, and I have given the same to them, undivided, and it is my will that the said lot shall not be divided into separate parcels, but sold together, and the proceeds of the sale thereof divided between them." Upon the final settlement of the estate in the probate court, the lot (4) as above described, was assigned to Patrick, John and James Brown, share and share alike, pursuant to the terms of the will; and the plaintiff John, with his wife, bring this action for a partition of three-quarters of the lot; that is to say, all that part not embraced in the deed to him.

The will contemplates the disposition of the lot treated as one entire parcel undivided, and it was so adjudged by the probate court, and the decree of assignment made accordingly. Upon the facts stated, the court below held that the plaintiff John Brown was required to elect whether he would accept the share of the property given him by the will, and consent to the disposition of the entire lot as therein provided, or retain that portion thereof previously claimed by him. It is undoubtedly a clear case for an election. It includes the two essentials—*first*, the testatrix gave to the plaintiff property of her own; and, *second*, she professed to give to the other devisees property belonging to him. In conformity with the general doctrine of equity on the subject of election, the plaintiff was therefore required to elect whether he would relinquish his own property and take under the will, in which case he should release or convey it so as to give full effect to the will, and the whole lot should be partitioned or disposed of as an entirety; and, if the plaintiff has encumbered that portion of the lot previously owned by

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him, the decree should so adjust the rights of the parties as to protect the other donees. In such cases, also, if the person on whom the duty of electing rests, elects to retain his own property, and against the will, then he will be entitled to no benefits under the will, unless the share given him by it shall exceed the value of his own property which the testator undertook to give to the other beneficiaries, and equity will appropriate the gift made to him to compensate them. Bisp. Eq. § 305; 1 Pom. Eq. Jur. §§ 468, 517; *Gretton* v. *Haward*, 1 Swanst. 409, 433-441, note. There is no finding or evidence in the case showing the relative value of the separate parcels of the lot in question, and there can be no presumption that the share given by the will exceeds the value of the part owned by the plaintiff. It is clear, therefore, that plaintiff has not made any case, whether he elected to take under the will or not, for a partition in his favor of the premises set out in the complaint, and the order of the court allowing him to amend and renounce or surrender his claim of title to the land described in the deed, and take under the will, is quite as favorable as he had a right to ask.

Order affirmed.

See further as to election by legatees other than the testator's widow, Isler v. Isler, 3 Am. Prob. Rep. 19.

BILLS *vs.* BILLS.

(80 Iowa, 269.)

CONSTRUCTION.—PRECATORY WORDS.

Where there is an absolute or unlimited devise or bequest, subsequent precatory expressions as to the disposition of the property after the death of the devisee or legatee, will not defeat the devise or bequest nor limit the estate therein to the right of use and possession during life.

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APPEAL from a judgment of the District Court of Jones County. The will construed is set forth in the opinion.

J. S. Stacy, for appellants.

Sheean & McCarn and *W. G. Thompson*, for appellees.

BECK, J.—1. The will presented for interpretation is in the following language: "In the name of God, amen: I, Sidney Elijah Bills, of the town of Strawberry Hill, in the county of Jones, and State of Iowa, of the age of sixty-one years, and being of sound mind and memory, do make public and declare this my last will and testament, in manner following; that is to say: *First*, I give and bequeath to my wife, Irene Bills, all of my real and personal property situated in Jones county, Iowa, except as hereinafter specified; *second*, I give and bequeath to my nephew Sanford H. Brownell all that real estate conveyed to me by him, containing one hundred and thirty-four acres, (134) more or less, situated in Decatur county, Iowa, and also all that real estate owned by me situated in the town of Sabula, Jackson county, Iowa; and, *third*, I give and bequeath to said Sanford H. Brownell the bay mare known by name 'Nellie' now in Jones county, Iowa, also one hundred dollars in money, same to be taken in payment for what I owe him at this time; *fourth*, I give and bequeath to my brother, Daniel B. Bills, the sum of one hundred dollars in money; *fifth*, all the real and personal property herein bequeathed to my wife, Irene Bills, remaining at her decease, I desire to be divided into five equal shares, to Daniel B. Bills and Abigail E. Diviney, and remaining shares to my brothers' two sons, Frank E. Bills and Frederick A. Bills, and Sanford H. Brownell. All of which said several legacies or sums of money I direct and order to be paid to said respective legatees within one year after my decease; and I hereby appoint as my executors of this my last will and testament, my wife, Irene Bills, and John Bender, of

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Jones county, Iowa, hereby releasing them from giving bonds, and hereby revoking all former wills by me made."

2. Plaintiff claims in her petition, and insists, that under the will she takes an absolute estate, in fee-simple, in the lands, and the absolute property in the personalty, of the estate, and that the fifth item of the will simply uses precatory language, and does not limit the estate and interest vested in plaintiff by the first item. Defendants maintain the contrary, insisting that plaintiff takes but a life estate in the property, with the right to possess, enjoy and use it, but after such estate and right shall be terminated by her death, the property shall be distributed under item 5 of the will.

3. In our opinion, the books teach these rules for the interpretation of wills. (1) When an estate or interest in land is devised, or personalty is bequeathed, in clear and absolute language, without words of limitation, the devise or bequest cannot be defeated or limited by a subsequent doubtful provision inferentially raising a limitation upon the prior devise or bequest. (2) When there is an absolute or unlimited devise or bequest of property, a subsequent clause expressing a wish, desire or direction for its disposition, after the death of the devisee or legatee, will not defeat the devise or bequest, nor limit the estate or interest in the property to the right to possess and use during the life of the devisee or legatee. The absolute devise or bequest stands, and the other clause is to be regarded as presenting precatory language. The will must be interpreted to invest in the devisee or legatee the fee-simple title of the land, and the absolute property in the subject of the bequest. *Williams* v. *Allison*, 33 Iowa, 278; *Benkert* v. *Jacoby*, 36 Iowa, 273; *Rona* v. *Meier*, 47 Iowa, 607; *Alden* v. *Johnson*, 63 Iowa, 127, 18 N. W. Rep. 696; *In re Will of Burbank*, 69 Iowa, 378; 28 N. W. Rep. 648; *McKenzie's Appeal*, 41 Conn. 607; *Jackson* v. *Bull*, 10 Johns. 20; *Mitchell* v. *Morse*, 77 Me. 423, 1 Atl. Rep. 141; *Ramsdell* v. *Ramsdell*, 21 Me. 288;

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Jones v. *Bacon*, 68 Me. 34; *Harris* v. *Knapp*, 21 Pick. 412; *Lynde* v. *Estabrook*, 7 Allen, 68; *Fiske* v. *Cobb*, 6 Gray 144; *Gifford* v. *Choate*, 100 Mass. 343; *Williams* v. *Worthington*, 49 Md. 572; *Foose* v. *Whitmore*, 82 N. Y. 405; *Campbell* v. *Beaumont*, 91 N. Y. 465; *Stowell* v. *Hastings*, 59 Vt. 494, 8 Atl. Rep. 738; *Siebert* v. *Wise*, 70 Pa. St. 147; *Moore* v. *Sanders*, 15 S. C. 297; *Anderson* v. *Cary*, 36 Ohio St. 506. Cases cited by defendants' counsel are not in conflict with the doctrines we have stated, in that the instruments interpreted therein, by their express language, did not vest the devisee with the fee of the land, nor the legatee with the absolute property in the subject of the bequest; a contrary purpose clearly appearing in the wills.

These views lead us to the conclusions that the district court rightly overruled the demurrer to plaintiff's petition.

Its judgment is affirmed.

Gift over after an absolute devise.—In Williams v. Allison, 33 Iowa, 278, the first citation in the principal case, the language of the testator was: "First, I give and bequeath to my beloved wife, all my property of every kind whatsoever, whether real or personal, rights, credits and demands, in law or equity, as fully as I might or could, if living, or in any manner have or hold the same. Second: In case of the death of my said wife, I give and bequeath my said property to my children. Third: In case my said wife survives me, and should not use or dispose of my said property, but at the time of her death, a portion thereof should remain undisposed of by her, I give and bequeath the same to my said children, or the survivors of them share and share alike." Of this the court, per Cole, C. J. said: "The first clause of the will gives the property in fee absolutely to the wife, Elizabeth Henn. The second clause is most evidently to be construed as if it read 'in case of the death of my said wife, *before my decease*, I give and bequeath,' etc. The third clause does not limit the estate, the absolute fee given by the first clause to the wife, nor curtail her power of disposal; it simply directs the disposition of what should remain undisposed of by her. What, if anything, would be the effect of this clause of the will, in a controversy for such remainder, between the children of Bernhart Henn and the children of his wife by a second husband, claiming such remainder as her heirs, we need not determine, for no such case is presented. But as between her and the children, we hold that she is so possessed of the absolute fee, as that any disposition of the

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property made by her, either as grantor in a conveyance,or as party to a suit, binds the property and concludes the children."

In Benkert v. Jacoby, 36 Iowa, 273, the next case cited in the principal case, the court in construing a will containing an absolute devise to the widow in one clause, followed by a gift over of "the whole property" to a daughter, with the direction that the latter should pay certain legacies, said: "There are numerous cases of wills containing clauses similar in substance with the first and second in this case, holding that the widow took but a life estate under the first clause and that a fee passed to the devisor by the second clause. Smith v. Bell, 6 Pet. 80; Boyd v. Stranhan, 36 Ill. 359; Selgwald v. Selgwald, 37 Ill. 435; Bergan v. Cahill, 55 Ill. 160; Schoonmaker v. Stockton, 37 Pa. St. 467; Meerselman's Estate, 39 Pa. St. 469. The ground upon which these cases are based is, that taking the two clauses together, it was the clear *intention* of the testator that the widow should enjoy the estate during her life, and that at her death it should go to the devisee named in the second clause. To give effect therefore to both clauses, and, guided by the testator's intention, it is held that under the first clause, although standing by itself, would be sufficient to pass a fee, a life estate only passed—the second clause qualifying the general language of the first. The power to dispose of the property devised at pleasure, given in the first clause, being held to be limited by the qualifying and restraining language of the second clause to mean 'such disposal as a tenant for life can make.' Does the third clause of the will in this case qualify or change the intention manifested by the two former when standing together without the third? It is as follows: 'If, however, my wife shall be compelled to *diminish* the property, *so that after her death the property is less than at present*, then my daughters, Elizabeth, Susanna, and Margaretta, shall divide the property and Elizabeth shall have two shares and the others one share.' By the language here used, it is clear the testator comtemplated that under the first clause of his will, he had conferred upon his widow such a title in the property as, that after his death she would have the power to diminish it, so that at her death it would be less than when she should receive it." And the court accordingly held the widow to be vested with the fee, and to have power to defeat the gift over to the other devisees by a conveyance to the plaintiff.

See also Colton v. Colton, 6 Am. Prob. Rep. 11, and the monographic and cross-reference notes on "Precatory Words."

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CONGER *vs.* LOWE.

(124 Indiana, 368.)

CONDITIONAL ESTATE.—VESTED REMAINDER.

A devise to testator's son for life upon condition that he occupy the estate, with a limitation over in fee to his "lawful heirs" upon his death or refusal to occupy, creates a vested remainder in the children of the life-tenant, who immediately become entitled to possession upon their father selling and delivering possession to a stranger.

APPEAL from a judgment of the Circuit Court of Fulton County. The opinion discloses the facts.

G. W. Holman, R. C. Stephenson and *J. H. Bibler* for appellants.

M. L. Essick, O. B. Montgomery, J. Rowley and *M. A. Baker* for appellees.

MITCHELL, J. The controversy here is over the construction of a clause in the last will and testament of Lewis B. Conger, late of Fulton County, deceased, which reads as follows: "My beloved wife, Hannah, is to have and to hold the two above described pieces of land during her lifetime; at her decease, I will, devise and bequeath the same to my son, Samuel M. Conger during his natural lifetime: *Provided*, he will live on and occupy the same; at his death, or his refusal to live on or occupy the same, then and in that case, as well as at the said Samuel M. Conger's death, I will, devise and bequeath the same to the said Samuel M. Conger's lawful heirs."

The testator died in 1874, and at the time of his death his son, Samuel M. Conger, had four children living, born in lawful wedlock. Others have been born to him since. The testator's widow died in 1880. Upon the death of his mother, Samuel M. took possession of the farm devised to him as above, and occupied it with his family until the 21st day of May, 1886, when

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he conveyed it by warranty deed to Louisa Lowe, wife of Peter D. Lowe, since which time he has ceased to live upon or occupy the land. This suit is by the children of Samuel M. Conger, who is still in life, their claim being that, under the will of their grandfather, the title vested in them, and that they became entitled to the possession when their father abandoned and conveyed away the farm. It is abundantly clear that the purpose of the testator was: 1. To create an estate for life in his widow, with a remainder over for life to his son Samuel M.; and, 2. To limit the fee over to the "lawful heirs" of his son, the limitation over to take effect in possession, either upon the refusal of his son to occupy the land or upon his death. Shortly expressed, the devise was to Samuel M. Conger for life, upon condition that he occupy the estate, with a limitation over in fee to his "lawful heirs," to take effect upon the death or upon the refusal of the life tenant to occupy.

A preliminary inquiry arises concerning the validity and effect of the condition, which makes, or attempts to make, the precedent life estate of Samuel M. defeasible upon his failure or refusal to occupy the land. The purpose and practical effect of the condition was to impose a restraint upon the power of the life tenant to alienate his estate in the land, either voluntarily or involuntarily. Surely, if the continuance of his estate depended upon his taking and remaining in possession during his lifetime, his power to sell was effectually restrained, for of what value was the right to sell if the estate sold was defeated the moment the vendor put the purchaser into possession?

It is a settled rule in the law that conditions in conveyances or devises in fee in general restraint of the power of alienation, are void, as being contrary to the policy of the law, and inconsistent with, and repugnant to, the estate granted. *Allen* v. *Craft*, 109 Ind. 476, 9 N. E. Rep. 919; *Mandlebaum* v. *McDonell*, 29 Mich. 78 (18 Am. Rep. 61); *McCleary* v. *Ellis*, 54 Iowa, 311 (37 Am. Rep. 205), 6 N. W. Rep. 571, 20 Am. Law Rep. 180, and note; *DePeyster* v. *Michael*, 6 N. Y. 467; 1 Shars.

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& B. Lead. Cas. Real Prop. 130, 6 Am. & Eng. Encyc. Law, 877.

Where, however, an estate for life or years is created, with a reversion to the grantor, or a valid remainder over to designated persons, conditions imposing restrictions and qualifications upon the power to alienate or use the estate, are valid and maintainable upon reason and authority. Even estates in fee simple may be subjected to valid limitations over, and be made defeasible or subject to forfeiture, upon condition that the grantee or devisee uses, or fails to use the estate in a particular way, or for a particular purpose, or conveys it to a certain person, or to any person whatever, or allows it to be sold on execution, or to become encumbered, or the like.

Where a precedent estate is made defeasible upon the happening of a certain event, which event also marks the taking effect in possession of a valid limitation over, the happening of that event puts an end to the precedent estate, and gives the right of possession to the person in whom the remainder or reversion is vested. The foundation of the power to restrain alienation rests upon the fact that there remains, or is vested, in some one a valid remainder or reversion, whose estate in possession is contingent upon some event, which defeats the precedent estate, and who is entitled to take advantage of the prohibited act or use. *Harmon* v. *Brown*, 58 Ind. 207; *O'Harrow* v. *Whitney*, 85 Ind. 140; *Mandlebaum* v. *McDonell*, *supra*; *De Peyster* v. *Michael*, *supra*.

If, then, it shall be found that the devise created an estate for life in Samuel M. Conger, defeasible upon the condition that he refused to occupy, with a valid reversion or remainder over in fee to persons who are entitled to take advantage of the condition, it must follow that the condition was valid and enforceable. In that event, creditors, purchasers, all persons dealing with the land, were chargeable with notice of the will, and of the defeasible character of the estate of the devisee, and of the fact that it was limited over to others

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to take effect upon the refusal of the life-tenant to occupy. We adopt the language of Mr. Justice MILLER in *Nichols* v. *Eaton*, 91 U. S. 716, wherein the learned justice says: "Nor do we see any reason, in the recognized nature and tenure of property, and its transfer by will, why a testator who *gives*, who gives, without any pecuniary return, who gets nothing of property value from the donee may not attach to that gift the incident of continued use, of uninterrupted benefit of the gift, during the life of the donee. Why a parent, or one who loves another, and wishes to use his own property in securing the object of his affection, as far as property can do it, from the ills of life, the vicissitudes of fortune, and even his own improvidence, or incapacity for self-protection, should not be permitted to do so, is not readily perceived." *Cowell* v. *Springs Co.*, 100 U. S. 55, *Woodworth* v. *Payne*, 74 N. Y. 196.

As a matter of course, all that has preceded depends upon whether or not the will creates a life-estate, with a valid remainder over in fee. If, as is contended, Samuel M. Conger took an estate in fee, within the rule in *Shelley's Case*, then the condition is void, because no one can create an estate that in law constitutes a fee, and then deprive the owner of those essential rights and privileges which the law annexes to it, without reserving a reversion to himself, or to some one in whom the right to insist upon the condition is vested. It is proper now, to examine the scheme that the testator had in his mind, and to which he desired to give effect in his will, so as to ascertain, if possible, whether the phrase "lawful heirs," was used in the proper or technical sense. If it was the intention that the lawful heirs of Samuel M. Conger should take the estate from their father by descent, after the termination of his life-estate, then the whole estate must have vested in him. When an estate is given to one for life, with the remainder to his heirs, the law, by an arbitrary rule, vests the whole estate in the ancestor. *Siceloff* v. *Redman*, 26 Ind. 251; *Kleppner* v. *Laverty*, 70 Pa. St. 70; 6 Am. & Eng. Enc. of Law, 879. The rule is an unbend-

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ing one, that if an estate be given, as an immediate remainder to the heirs of one in whom an interposed estate is vested, the whole estate is united and vests as an executed estate of inheritance in the ancestor, upon the principle that the inheritance cannot be greater than the estate vested in the ancestor. *Doebler's Appeal*, 64 Pa. St. 9. The rule that the word "heirs," when found in a will, will be construed as a word of limitation, and not of purchase, unless there be explanatory words clearly showing that it was used in a popular or restricted sense, admits of no exception, and when the word is used as a word of limitation it is wholly immaterial that the testator's intention may be frustrated by the application of the rule. *Allen* v. *Craft*, *supra*, and cases cited. It is only when it clearly appears from the context that the word was not used as a word of limitation, but of purchase, that the rule will not be permitted to defeat the manifest intent of the testator. When the intention to use a word, supposed to be a word of limitation, as a word of purchase, unmistakably appears in the will, the rule has always yielded to the clear intention of the testator. *Belslay* v. *Engel*, 107 Ill. 182; *Millett* v. *Ford*, 109 Ind. 159, 8 N. E. Rep. 917. The rule in Shelley's case is not regarded as a device to discover the testator's intention. It is only applied after his intention has been discovered, when, by its own inexorable force, it unites in the ancestor any estate which his heirs are to take as such, after a precedent estate given to him, no matter what the purpose of the testator may have been. It should be remembered that there is a material and controlling distinction between a devise of an estate to a person named and his lawful heirs, and a devise to the lawful heirs of a person named, and the fact should be kept in view that the devise under consideration falls within the latter class. Thus in *Simms* v. *Garrot*, 1 Dev. & Bat. Eq. 393, where a bequest of personal property was made to a person during her natural life, and at her death to her lawful heirs it was held that a legacy to the lawful heirs of a person living is equivalent, as a descrip-

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tion, to a legacy to his next of kin, or to his children. *Shimer* v. *Mann*, 99 Ind. 190; *Darbison* v. *Beaumont*, 1 P. Wms. 229. Where the devise is made directly to the heirs of a person living, since no one can be heir to the living in the technical sense, there would be no one capable of taking the estate devised, except by construing the word "heirs" to mean "kinsman" or "children." Where the devise is to a person and his lawful heirs, no such obstacle is encountered.

The language employed in the will under consideration makes it certain that the persons referred to therein as Samuel M. Conger's lawful heirs were to take under the will directly from the testator, and not by descent from Samuel M. Conger, as heirs. The testator declared, in terms that cannot be mistaken, that upon the death of his son, or upon his refusal to occupy or live on the farm , "I will, devise and bequeath the same to the said Samuel M. Conger's lawful heirs." It is clearly apparent that the testator contemplated that the persons designated as "lawful heirs" should be persons living before the death of Samuel M. Conger, because not only the title, but the possession of the estate in remainder over was to vest in them by the terms of the will, as well upon the failure or refusal of his son to occupy the farm as upon his death. Uncontrolled by the context, the phrase "lawful heirs" would designate those persons who, under the statute of descents, would succeed to the property, in case the testator's son should die intestate. But there was a contingency provided for in the will upon which the remainder over was to take effect before the death of his son, and it is therefore absolutely certain that the testator did not use the phrase for the purpose of designating the whole class of lineal or collateral relatives who, at the death of his son, might fall within that denomination. It is true that the word "heirs," unless other parts of the will imperatively require it, is to be taken as having been used in its technical sense; yet, when to use it in that sense renders the general purpose and intent of the will insensible under any rule of

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law, and defeats the manifest purpose of the testator, the circumstances are persuasive that the testator must have used the word to designate some other class of persons than those technically denominated "heirs." When it becomes manifest that it was used as a synonym for "children," or in some modified sense, the rule in Shelley's case will not be applied to overturn the testator's intentions. *Underwood* v. *Robbins*, 117 Ind. 308, 20 N. E. Rep. 230; *Millet* v. *Ford*, *supra*; *Ridgeway* v. *Lanphear*, 99 Ind. 251.

As is pertinently said in *Daniel* v. *Whartenby*, 17 Wall, 639: "But if there are explanatory and qualifying expressions from which it appears that the import of the technical language is contrary to the clear and plain intent of the testator, the former must yield, and the latter will prevail." As we have already seen, it is clear that the phrase "lawful heirs" could not have been used by the testator to designate those who should succeed to his son's estate upon his death. To give it such a construction would render nugatory and meaningless the provision that the estate was devised to the lawful heirs of the life tenant, in case the latter refused to occupy it. The will is therefore to be read as if the word "children" had been used instead of "heirs." The conclusion follows that upon the death of the testator Samuel M. Conger took a life estate in the land in controversy, which was defeasible upon condition that he refused to live upon or occupy the estate, and that the will created a vested remainder over in fee in his children, to take effect in possession upon the termination of the estate of their father. Upon the death of the testator, the remainder in fee vested in the children then living, subject, however, to open and let in after-born children, who should be born in lawful wedlock during the lifetime of their father. *Surdam* v. *Cornell*, 116 N. Y. 305, 22 N. E. Rep. 450; *Monarque* v. *Monarque*, 80 N. Y. 320.

The court erred in sustaining the demurrer to the complaint.

Judgment reversed, with costs.

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See also Chapman v. Chich, 6 Am. Prob. Rep. 310; Davies v. Davies, 6 Am. Prob. Rep. 361, and the note; Walker v. Pritchard, 6 Am. Prob. Rep. 381, and the note. *Cf.* Mitchell v. Mitchell, 7 Am. Prob. Rep. 170, *infra*.

HAMMOND *vs.* DIKE.

(42 Minnesota, 273.)

TESTAMENTARY CAPACITY.—EVIDENCE.—CODICIL.

Upon an issue of testamentary capacity, where the testator, who had previously been of sound disposing mind and memory, was suddenly prostrated with severe and fatal illness, during which he executed a codicil to his will, it is competent for the proponent to prove that a short time before he was taken sick the testator had expressed his intention to make such changes in his will as he did make by his codicil.

It is proper in such a case, to show the consistency of the will with the natural inclinations and previously declared intentions of the testator.

Where it is sought to impeach the statements of a witness by proof of his admissions contained in a deposition or other writing signed by him, the proper foundation should be laid therefor as in other cases, by first directing his attention to the particular matters in question, and giving him an opportunity to explain.

APPEAL from an order of the District Court of Rice County. The facts appear in the opinion.

H. S. Gipson, for appellant.

Geo. W. Batchelder, for respondents.

VANDERBURGH, J.—This controversy arises over the codicil to the last will of William H. Dike, deceased, the validity of which is contested by the respondents, on the sole ground that at the time of its execution he was not of sound disposing mind and memory. By his will, which was made in 1886, he made the following disposition of the estate then possessed by him, viz: "After my wife, Matilda M. Dike, has received what is

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secured to her by the laws of this state, all the rest and residue of my estate, real and personal, I give and bequeath, share and share alike, to Mary A. and M. Louise Hammond, daughters of John and Maria Hammond, of Essex county, New York." The codicil makes additional provision for his wife, and it is as follows: "I give and bequeath to my wife, Matilda M. Dike, two-thirds of the judgment lately recovered by me against the state of Minnesota, on my old railroad claims, in addition to a life estate in our homestead, and she shall have one-third of all the rest and residue of the estate, the same as the law would give it if there were no will, and the rest shall go as in my last former will directed." It is affirmed by the verdict of the jury that the codicil was formally executed; that is to say, it was signed by the testator, and duly attested in his presence. And it is beyond controversy that, up to the Sunday preceding his death, he was of sound mind, and had sufficient testamentary capacity to dispose of his estate, by will or otherwise, though he was of the age of 75 years, and was suffering from a complication of diseases which had become chronic. His fatal illness began on Sunday night, and commencing with severe pain, speedily resulted in great bodily weakness and prostration. He executed the codicil on Monday evening, and died the next morning. He was apparently in a state of unconciousness most of the time during his sickness, believed by some of the medical witnesses to have been *coma* caused by uremic poisoning, the result of kidney disease. But the evidence in behalf of the proponent tended to show that he could be aroused, and was conscious at intervals, and that he answered questions recognized persons, including the attesting witnesses, and voluntarily gave directions in respect to his will; spoke of his own accord of the judgment which he had obtained; and, in answer to a request made of him by his wife, *the proponent*, declined to give her certain property, and declared his purpose to adhere to his previously expressed intention to give the property spoken of by her to the contestants. There is a con-

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flict between the medical experts as to the measure of consciousness and mental capacity which he may have had, or which would be compatible with his physical condition. One of them called by proponent, testified that he evidently understood his condition and would be able to decide about such things as were suggested by the counsel, and "that it was not unusual in uremic conditions for patients to arouse to a sound mental condition."

After the class of evidence we have referred to had been introduced on behalf of the proponent, and in connection therewith, as a part of her case, her counsel offered to prove that the week before the testator died he had arranged to have his will changed in the way it was changed by the codicil, and his declarations on that subject; and also that on the Saturday previous to his death he informed one Lowell that he would like to come to his office to make a change in his will, involving the disposition of two-thirds or three-fourths of the judgment referred to. This evidence was objected to by the contestants, and the court sustained the objection on the ground that there was no question of undue influence in the case. It must be taken as a ruling upon the merits of the proposition. Had mere formal objections been made, they might have been obviated at the time. The question must therefore be deemed to be fairly raised as to the competency and materiality of such evidence on the issue of the testamentary capacity of the testator. We think the evidence was admissible on that issue. The question was, substantially, whether of his own free will the testator intended to make the testamentary disposition it is claimed he did make by his codicil, and whether he was able to and did comprehend the nature and effect of the transaction in its different bearings, including the subject-matter and the effect of the testamentary act upon his heirs and legatees named in the prior will. 1 Redfield on Wills * 130, notes. A testator may be of sound disposing mind and memory sufficient to sustain a will executed by him, though the state of his health

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and consequent mental condition may be unequal to business transactions of a more exacting nature; and his strength might hold out for the completion of a transaction involving but few details, and requiring his attention but a short time, while it would be insufficient for the disposition of a large estate under an elaborate will. *Kempsey* v. *McGinnis*, 21 Mich. 123; Schouler on Wills, § 32; *Sheldon* v. *Dow*, 1 Dem. Sur. 513. Certainly, then, in determining the question of the capacity of the testator to understand the situation in which he stood in relation to the disposition of his estate, whether the subject was new or familiar, to his thoughts, and what his previous intentions may have been, as shown by his acts or declarations, were important and material matters for the consideration of the jury. It is said by an eminent judge, in *Harrison* v. *Rowan*, 3 Wash. C. C. 580, 586, "that most men, at different periods of their lives, have meditated upon the subject of the disposition of their property by will, and, when called upon to have their intentions committed to writing, they find much less difficulty in declaring their intentions than they would in comprehending business in some measure new." If, then, the testator, in this instance, contemplated a change in the terms of his will, in view of an accession to his property, and had manifested his purpose so to do a short time before his sickness, these things would be material to be considered in determining whether he was able to understand, and did understand the nature of the business in which he was engaged at the time he executed the codicil, and the scope and effect of the transaction. *Sloan* v. *Maxwell*, 3 N. J. Eq. 572; *Banks* v. *Goodfellow*, L. R. 5 Q. B. 567; *Moore* v. *Moore*, 2 Bradf. Sur. 261. It is well settled that the nature and terms of the will itself are to be judicially regarded as an essential and important part of testamentary capacity; and so, also, must be regarded its consistency or inconsistency with the situation, natural inclinations, and previously declared intentions of the testator. *Dinges* v. *Branson*, 14 W. Va. 103, 118;

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In re Blakely's Will, 48 Wis. (301, 4 N. W. Rep. 337); *Irish* v. *Smith*, 8 Serg. & R. 573. And this rule is just as applicable in cases of doubtful capacity from death-bed sickness as from other causes. *Stewart* v. *Lispenard*, 26 Wend. 313; *Irish* v. *Smith*, 8 Serg. & R. 573. Such declarations, especially if recent, inform the jury of the state of mind of the testator when confessedly sound, and so aid in determining whether the instrument is the product of the same will. *Thornton* v. *Thornton*, 39 Vt. 158, 159; *Woodcock* v. *Johnson*, 36 Minn. 217, (30 N. W. Rep. 894.) It was an error, therefore, to exclude the evidence offered. In view of another trial, we express no opinion in respect to the character of the evidence or its sufficiency to justify the verdict.

In the probate court the evidence of several witnesses was reduced to writing *in extenso*, in the form of depositions, and signed by the witnesses. Some of these depositions were offered in evidence entire by proponent, to impeach the testimony of the same witnesses on the trial in the district court but were rejected because the proper foundation had not been laid therefor by first directing the attention of the witnesses to the particular matters involved in the supposed contradiction, and giving them an opportunity to explain. The objection was well taken, and was properly sustained. The ruling of the court is in accordance with the settled rule of practice in this state.

Order reversed.

See *In re* Layman's Will, 7 Am. Prob. Rep. 127, *supra*, and the cross-references; also Schneider v. Manning, 6 Am. Prob. Rep. 372, and the cross-references.

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CLAFLIN *vs.* CLAFLIN.

(149 Massachusetts, 19.)

TRUSTS. — ACTIVE TRUST. — ACCUMULATION OF FUND. —PUBLIC POLICY.

There is no rule of public policy in Massachusetts forbidding the accumulation of a fund in the hands of an active trustee beyond the majority of the *cestui que trust*.

APPEAL from a decree of the Supreme Judicial Court of Suffolk County.

S. N. Aldrich and *E. G. McInnes*, for the plaintiff.

Henry Baldwin, for the defendants.

FIELD, J. By the eleventh article of his will, as modified by a codicil, Wilbur F. Claflin gave all the residue of his personal estate to trustees, "to sell and dispose of the same, and to pay to my wife, Mary A. Claflin, one-third part of the proceeds thereof, and to pay my son, Clarence A. Claflin, one-third part of the proceeds thereof, and to pay the remaining one-third part thereof to my son Adelbert E. Claflin, in the manner following, viz.: Ten thousand dollars when he is of the age of twenty-one years, ten thousand dollars when he is of the age of twenty-five years, and the balance when he is of the age of thirty years." Apparently, Adelbert E. Claflin was not quite 21 years old when his father died, but he some time ago reached that age, and received $10,000 from the trust. He has not yet reached the age of 25 years, and he brings this bill to compel the trustees to pay to him the remainder of the trust fund. His contention is, in effect, that the provisions of the will postponing the payment of the money beyond the time when he is 21 years old are void. There is no doubt that his interest in the trust fund is vested and absolute, and that no other person has any interest in it, and the weight of authority is undisputed that the provisions postponing

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payment to him until some time after he reaches the age of 21 years would be treated as void by those courts which hold that restrictions against the alienation of absolute interests in the income of trust property are void. There has indeed, been no decision of this question in England by the House of Lords, and but one by a Lord Chancellor, but there are several decisions to this effect by Masters of the Rolls, and by Vice-Chancellors. The cases are collected in Gray's Restraints on Alien. §§ 106-112, and Appendix II. See *Josselyn* v. *Josselyn*, 9 Sim. 63; *Saunders* v. *Vautier*, 4 Beav. 115, and on appeal, Cr. & Ph. 240; *Rocke* v. *Rocke*, 9 Beav. 66; *In re Young's Settlement*, 18 Beav. 199; *In re Jacob's Will*, 29 Beav. 402; *Gosling* v. *Gosling*, H. R. U. Johns. 265; *Turnage* v. *Greene*, 2 Jones Eq. 63; *Battle* v. *Petway*, 5 Ired. 576. These decisions do not proceed on the ground that it was the intention of the testator that the property should be conveyed to the beneficiary on his reaching the age of 21 years, because in each case it was clear that such was not his intention, but on the ground that the direction to withhold the possession of the property from the beneficiary after he reached his majority was inconsistent with the absolute rights of property given him by the will. This court has ordered trust property, to be conveyed by the trustee to the beneficiary when there was a dry trust, or when the purposes of the trust had been accomplished, or when no good reason was shown why the trust should continue, and all the persons interested in it were *sui juris* and desired that it be terminated; but we have found no expression of any opinion in our reports that provisions requiring a trustee to hold and manage the trust property until the beneficiary reached an age beyond that of 21 years are necessarily void if the interest of the beneficiary is vested and absolute. See *Smith* v. *Harrington*, 4 Allen, 566; *Bowditch* v. *Andrew*, 8 Allen, 339; *Russell* v. *Grinnell*, 105 Mass. 425; *Inches* v. *Hill*, 106 Mass. 575; *Sears* v. *Choate*, 146 Mass. 395, 15 N. E. Rep. 786. This is not a dry trust, and the purposes of the trust have not been accomplished if the intention of the testator is to be carried out.

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In *Sears* v. *Choate* it is said: "Where property is given to certain persons for their benefit, and in such a manner that no other person has or can have any interest in it, they are in effect the absolute owners of it, and it is reasonable and just that they should have the control and disposal of it unless some good cause appears to the contrary." In that case the plaintiff was the absolute owner of the whole property, subject to an annuity of $10,000, payable to himself. The whole of the principal of the trust fund, and all of the income not expressly made payable to the plaintiff, had become vested in him when he reached the age of 21 years, by way of resulting trust, as property undisposed of by the will. Apparently the testator had not contemplated such a result, and had made no provision for it, and the court saw no reason why the trust should not be terminated, and the property conveyed to the plaintiff. In *Inches* v. *Hill*, *ubi supra*, the same person had become owner of the equitable life-estate and of the equitable remainder, and "no reason appearing to the contrary," the court decreed a conveyance by the trustees to the owner. See *Whall* v. *Converse*, 146 Mass. 345. In the case at bar nothing has happened which the testator did not anticipate, and for which he has not made provision. It is plainly his will that neither the income nor any part of the principal should now be paid to the plaintiff. It is true that the plaintiff's interest is alienable by him, and can be taken by his creditors to pay his debts, but it does not follow that because the testator has not imposed all possible restrictions—the restrictions which he has imposed should not be carried into effect. The decision in *Bank* v. *Adams*, 133 Mass. 170, rests upon the doctrine that a testator has a right to dispose of his own property with such restrictions and limitations, not repugnant to law, as he sees fit, and that his intentions ought to be carried out unless they contravene some positive rule of law, or are against public policy. The rule contended for by the plaintiff in that case was founded upon the same considerations as that contended for by the plaintiff in this

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and the grounds on which this court declined to follow the English rule in that case are applicable to this, and for the reasons there given we are unable to see that the directions of the testator to the trustees, to pay the money to the plaintiff when he reaches the age of 25 and 30 years and not before, are against public policy, or are so far inconsistent with the rights of property given to the plaintiff that they should not be carried into effect. It cannot be said that these restrictions upon the plaintiff's possession and control of the property are altogether useless, for there is not the same danger that he will spend the property while it is in the hands of the trustees as there would be if it were in his own.

In *Sanford* v. *Lackland*, 2 Dill. 6, a beneficiary who would have been entitled to a conveyance of trust property at the age of 26 became a bankrupt at the age of 24, and it was held that the trustees should convey his interest immediately to his assignee, as "the strict execution of the trusts in the will have been thus rendered impossible." But whether a creditor or a grantee of the plaintiff in this case would be entitled to the immediate possession of the property, or would only take the plaintiff's title *sub modo*, need not be decided. The existing situation is one which the testator manifestly had in mind, and made provision for; the strict execution of the trust has not become impossible; the restriction upon the plaintiff's possession and control is, we think, one that the testator had a right to make; other provisions for the plaintiff are contained in the will, apparently sufficient for his support, and we see no good reason why the intention of the testator should not be carried out. *Russell* v. *Grinnell*, 105 Mass. 425; *Toner* v. *Collins*, 67 Iowa, 369, 25 N. W. Rep. 287; *Rhoads* v. *Rhoads*, 43 Ill. 239; *Lent* v. *Howard*, 89 N. Y. 169; *Barkley* v. *Dosser*, 15 Lea, 529; *Carmichael* v. *Thomson*, 5 Cent. Rep. 500; *Lampert* v. *Haydel*, 20 Mo. App. 616.

Decree affirmed.

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Abrogation of continuing trusts.—In Lent v. Howard, 89 N. Y. 169, 181, cited in the principal case, the executors were directed to set apart and invest ten thousand dollars on bond and mortgage for the maintenance of the testator's daughter during her minority and to pay the income to her thereafter during her life, and in case of her death before the death of his wife, to pay the principal sum to the latter. The plaintiffs being the only persons interested, united in asking that the trust be extinguished. The court, *per* Andrews, C. J., said: "There are authorities which hold that it is in the power of a court of equity to decree the determination of unexecuted trusts of this nature, where the parties beneficially interested unite in the application (Smith v. Harrington, 4 Allen, 566; Perry on Trusts, Sec. 920, and cases cited.)Whatever view may be taken of the general jurisdiction of courts of equity, in the absence of any statutory or legislative policy, to abrogate continuing trusts, created for the purpose of providing a sure support for the widow or children of a testator, or other beneficiary, the indestructibility of such trusts here, by judicial decree, results, we think, from the inalienable character impressed upon them by statute. The beneficiaries of trusts for the receipt of the rents and profits of land are prohibited from assigning or disposing of their interests (1 R. S. 729, Sec. 63), and this provision is held to apply, by force of other sections of the statute to the interest of beneficiaries in similar trusts of personalty. (Graff v. Bonnett, 31 N. Y. 9.) This legislative policy cannot, we think, be defeated by the action of the court permitting such alienation, or abrogating the trust. (See Douglass v. Cruger, 80 N. Y. 15.)"

In Russel v. Grinnell, 105 Mass. 425, cited in the principal case, one whose "use and support" a legacy had been bequeathed in trust, brought a bill in equity against the trustee to have the principal of the legacy paid over to him. The opinion of the court, *per* Chapman, C. J., was in full as follows: "The bequest in trust gave large discretionary powers to the trustees. They might apply not only the income, but so much of the principal as they might think proper, to the use and support of the *cestui que* trust, and they were not limited to any particular methods of making the application. In the exercise of a reasonable discretion, they had power to terminate the trust, if they thought proper; and in the exercise of the same discretion, they may continue to hold the property not yet expended. They do not seek instructions from the court as to their duty, and the plaintiffs have no right to do so. Bill dismissed with costs."

Rhoads v. Rhoads, 43 Ill. 239, decided in 1867, Mr. Justice Breese delivering the opinion of the court, held that the trust in question being such a one as the testator had power to make, should not be disturbed by the court; and that the devisees under it could only come into the enjoyment of their respective shares, in the mode prescribed by the will; but that the time of payment might be anticipated so far as the court deemed it necessary for the maintenance of the devisees, this not being a subversion of the will but only doing what

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it was evident from the will the testator would have done if he had been living.

See also Smith v. Towers, 6 Am. Prob. Rep. 589, and the cross-references; Genet v. Hunt, 6 Am. Prob. Rep. 477; and Cruikshank v. The Home for the Friendless, 6 Am. Prob. Rep. 490, and the cross-references.

LARMOUR *vs.* RICH.

(71 Maryland, 369.)

VESTED AND CONTINGENT REMAINDERS.

The law favors the early vesting of estates, and the courts will generally adopt the earlier of two possible periods. But the testator may defer that period and make the vesting of the estate depend upon a contingency; and when he has done so with reasonable certainty his wishes will prevail provided he does not transcend the time allowed by the rules of law.

APPEAL from a decree of the Circuit Court of Baltimore City. The facts appear in the opinion.

D. M. Thomas, for appellant.

Edward N. Rich, and *Wm. S. Bryan, Jr.*, for the appellees.

R. G. Keene filed a brief for Edward M. Barron, (infant,) one of the appellees.

MCSHERRY, J.—Jacob Myers executed a last will and testament on the 17th day of July, 1835. By the residuary clause he directed that all the rest and residue of his estate should be divided into ten equal parts. Three of these parts he gave to his three sons absolutely. Ten thousand dollars out of each of the remaining seven-tenths, making $70,000 altogether, he placed in trust for his seven daughters during their respective lives, giving them merely the income therefrom, "and from and immediately after the decease of my said

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seven daughters respectively, *then* in trust that one of said sum of $10,000, or the stocks and property in which the same may be vested, shall descend to and become the property of their child or children, respectively, his, her, or their heirs, executors, administrators and assigns, absolutely; if more than one, as tenants in common, to be equally divided between them, share and share alike; the issue of any deceased child of my said seven daughters, respectively, if any such issue there should be to have and take the part or share the parent of each issue respectively would if living, be entitled to, and in the event of the decease of any of the children of my said seven daughters, respectively, under age and without issue, the part or share of him, her, or them so dying shall descend to his, her, or their brother or brothers, sister or sisters, and in case it shall so happen that either of my said seven daughters shall depart this life without leaving a child or children or descendants of the same *living*, then in trust that the part or share of the daughter or daughters so dying shall descend to and become the property of my surviving children, their heirs, executors, administrators and assigns forever." By a codicil he extended these trusts to the whole of each daughter's share of the residuum. There are other codicils, but they do not relate to the question before us. By a deed of trust dated February 15, 1840, he assigned to trustees certain leasehold property, reserving to himself a life-estate therein. This deed provided that upon his death his daughter, Rebecca A. Miller, should, as to one moiety of the property, be permitted to take the rents and profits during her natural life, "and from and immediately after the decease of the said Rebecca A. Miller, *then* in trust that the said undivided moiety or equal half part of and in said ground and premises shall descend to and become the property of the children the said Rebecca A. Miller now hath, and the child or children she may hereafter have, their executors, administrators and assigns, as tenants in common, equally, the issue of any deceased child of the

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said Rebecca A. Miller, if any such issue there should be, to take and have the part share or proportion only to which the parent of such issue would, if living, be entitled; and in the event of the decease of any of the children of the said Rebecca A. Miller under age and without issue, the part, share or proportion of him, her or them so dying, shall descend to and become the property of the survivors or survivor of them; but in case the said Rebecca A. Miller shall depart this life without leaving a child or children, or descendants thereof, living at the time of her death, or in case she should leave a child or children, or descendants thereof, living at her decease, and such child or children, and descendants should subsequently depart this life under lawful age and without issue, then to the use, benefit and behoof of the right heirs of the said Jacob Myers and their assigns absolutely." Myers died in 1847. His daughter, Mrs. Miller had three children, Louisa K., Fanny K., and Virginia Miller, by her first marriage; and one child, Albert W. Barron, by her second marriage. Mrs. Miller died December 9, 1888, leaving her daughters, Fanny K. and Virginia, and a grandson, Edward M. Barron, the son of her deceased son, Albert W. Barron, surviving her. Her daughter Louisa K. married John Worrall Larmour in 1867, and died a few weeks afterwards, without issue, but leaving her husband surviving her. The trustees under the deed and will having all died, Rev. Arthur J. Rich was duly appointed in their stead, and now holds the entire trust estate. Upon the death of Mrs. Miller (afterwards Mrs. Barron) the trustee filed a petition asking the aid of the Circuit Court of Baltimore City in administering and settling the trust estate, and upon those proceedings the question now before us has arisen. That question, briefly stated, is, has John Worrall Larmour, by reason of his being the surviving husband of Louisa K. Miller, any interest in the property, and estate disposed of by the clauses already quoted from the will and deed of trust. The Circuit Court of Baltimore City held that he had not, and from its decree this appeal has been taken by him.

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It is a perfectly familiar maxim that the intention of the testator when apparent on the face of his will must be gratified if it be lawful to do so. The same rule is applicable to the construction of a deed. Obviously the most simple and the most natural way to ascertain what a testator's or a grantor's intention was, is to read what he has written, because what he has written was designed by him to express that intention. It is true, there are many other rules of construction to which resort is sometimes had. Some of these have been adopted by legislative enactment, and others are the outgrowth of judicial decisions. But they are rarely invoked, except when the intention is obscurely or inaptly expressed. Generally speaking, they are not suffered to defeat a clearly manifested intention; but occasionally the intention, though evident, is made to yield and bend to a fixed meaning attached to particular words If we lay aside, and put out of view for a moment these artificial rules, and read the language of the deed and will as it would strike the mind of one unacquainted with such rules, there will be little, if any, difficulty in discovering with reasonable certainty what Jacob Myers actually intended to do. This is permissible, because we are seeking to discover what is meant; and we must therefore put ourselves, as nearly as possible, in his place. We may, for the sake of brevity, eliminate the language pertaining to the trusts, as the result in this respect will be precisely the same. Under the deed, then, he reserved to himself a life-estate in the leasehold property. Upon the termination of that estate he gave the rents, issues and profits of one-half of this property to his daughter Rebecca A. Miller, during her life. From and immediately after her decease he directed that the property itself should then "descend to and become the property of the children the said Rebecca now hath, and the child or children she may hereafter have;" "the issue of any deceased child * * * to take and have the part" "to which the parent of such issue would, *if living*, be entitled." "*If living*" clearly means, "if

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living at the time of Mrs. Miller's death." He further declared—first that if his daughter should die without leaving a child or children or descendants of the same *living at the time of her death*; or, secondly, that in case she should leave a child or children or descendants thereof living at her decease, and such child or children and descendants should subsequently depart this life under lawful age, and without issue, the property should pass to his right heirs. Certainly, so long as Mrs. Miller lived, her children were to get nothing *in possession*; but upon her death the *corpus* of the estate was to "descend to" them and become their property, and the child of a deceased child was to take the share his parent would have taken had that parent survived Mrs. Miller. *Her death* was fixed by him as the point of time at which the *corpus* of the estate should "descend to and become the property of" her children. This is the obvious import of his words, apart from the subsequent contingencies in the same sentence, whereby he provided that his right heirs were to succeed to the estate in the event of those two contingencies happening. It was possible, at the date of the deed, that either of these alternative contingencies, might have occurred; but it was impossible, giving to his words their ordinary and natural signification that the estate should "descend to" or "become the property of" Mrs. Miller's children or their descendants, in any event, until *her death.* The will is substantially similar though there is some slight difference in the two alternative contingencies which does not, however, affect the question involved on this appeal. Jacob Myers has, according to the plain import of these instruments, indicated with *reasonable certainty* the time at which he wished Mrs. Miller's one-seventh of the residuum of his estate under the will and her one-half of the leasehold property under the deed to vest in her children, to "become" their property; and that time, as he has fixed it, could never be reached during the life of his daughter, Mrs. Miller. Hence, if this intention of his is to prevail, no portion of the

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estate could possibly vest in any child of Mrs. Miller not living at Mrs. Miller's death. This being so, it remains to inquire whether the intention thus manifested is in conflict with any settled principle of the law, or any paramount rule of construction. The law, it may be conceded, favors the early vesting of estates, and the Courts will, as a general rule, where there is more than one period mentioned, adopt the earlier one, if there be no expression or no intent plainly deducible from the terms used, indicating that the testator meant to select the latter, and not the earlier period. Upon these principles rest the decisions in *Meyer* v. *Eisler*, 29 Md. 28; *Taylor* v. *Mosher*, 29 Md. 443; *Fairfax et al.* v. *Brown et al.*, 60 Md. 50; *Crisp Trustees* v. *Crisp et al.*, 61 Md. 149, and others of the same class, where the estates were held to have vested upon the death of the testator, but the testator may if he chooses, fix the period of vesting to suit himself, provided he does not transcend the time allowed by the rules of law. He may defer that period and make the vesting of the estate depend upon a contingency. When he has done this with *reasonable certainty*, his wishes will prevail and the estate will not vest until the happening of that contingency. This principle underlies the cases of *Engel* v. *State, use of Geiger*, 65 Md. 544, 5 Atl. Rep. 249. *Straus* v. *Rost*, 67 Md. 465, *Bailey* v. *Love*, 67 Md. 603, *Merc. Trust and Dep. Co.* v. *Brown*, 71 Md. 166; 17 Atl. Rep. 937, and *Demill* v. *Reid*, 71 Md. 175; 17 Atl. Rep. 1014. These cases have been so recently decided that we need make no citations from them. They completely cover the question involved here, and are, in our opinion, decisive of it. The whole controversy resolves itself into the single inquiry whether the equitable estates in remainder were vested or contingent remainders? And whether they were the one or the other depends largely upon what Jacob Myers intended them to be. Had no future period been fixed by him with reasonable certainty, the law itself would have treated the remainders as having vested upon the execution and de-

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livery of the deed and the death of the testator respectively: and the case would then have been one of the class to which *Crisp* v. *Crisp*, and the others first cited belong. But a future period having been fixed, and the time of its occurrence having been uncertain until the death of Mrs. Miller, the remainders were clearly alternative contingent remainders, or contingent remainders with a double aspect, as they are sometimes called: and so the case comes within the class to which those last noted belong. These remainders never vested in Louisa K. Miller, the wife of Mr. Larmour, because she died in the life-time of her mother, before the period fixed for the remainders to vest. Necessarily, therefore, her husband acquired no interest therein, and the decree of the Circuit Court is, in our judgment, entirely correct, and must be affirmed. Each case of this character must, in a great measure, be decided on its own peculiar circumstances. Hence other cases, where somewhat similar language has been construed, and where different results were reached in accordance with the intentions of the several testators as understood or interpreted in the light of the facts disclosed in those cases, cannot control the determination of this case. The conclusion to which we have come does not in any respect conflict with former rulings of this court. The costs of this appeal will be directed to be paid out of the trust-estate.

Decree affirmed.

See Weatherhead v. Stoddard, 5 Am. Prob. Rep. 284; Gibbens v. Gibbens, 5 Am. Prob. Rep. 92.

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ALEXANDER *vs.* NORTHWESTERN MASONIC AID ASSOCIATION.

(126 Illinois, 558.)

DESCENT AND DISTRIBUTION. — LIFE INSURANCE. — HEIRS AT LAW.—RIGHTS OF WIFE.

A policy of insurance, payable to "the devisees or heirs at law" of the insured, is payable to his widow and not to his next of kin, upon his dying intestate leaving no children,—she being the sole heir of his personal property under Rev. St. Ill. c. 39, Sec. 1; and the fact that she was the beneficiary directly named in other policies of insurance on her husband's life does not change the rule of construction.

APPEAL from a judgment of the Appellate Court for the First District. The opinion discloses the facts.

Cratty Bros. & *Ashcraft*, for plaintiffs in error.

E. Walker, for defendants in error.

CRAIG, C. J.—This was a bill of interpleader brought by the Northwestern Masonic Aid Association, a corporation organized under the laws of this State, in which it is alleged that the association was organized on the 27th day of June, 1874; that the object for which it was formed was to secure pecuniary aid to the widows, orphans, heirs and devisees of deceased members; that on the 28th day of January, 1882, the association issued and delivered to Elijah S. Alexander three certificates, under which it agreed to pay, upon the death of Alexander, the sums therein named, amounting in the aggregate to $8,500, to his devisees or heirs at law. It is also alleged that Alexander died on the 23d day of February, 1886, leaving no will or devisee; that proofs of death have been duly made; that the association is ready and willing to pay the amounts named in the certificates to the person or persons entitled thereto; that Josephine P. Alexander, widow; Willard H. Alexander, father; Eunice L. Alex-

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ander, mother; Serotia A. Alexander, sister; Charles E., John F., and Edward Frank Alexander, brothers of the deceased, make claim to the $8,500. The bill prays that the parties named may be made defendants, that they may interplead and settle and adjust their demands and differences between themselves; that the fund should be distributed by decree between those entitled thereto. Josephine P. Alexander, the widow, answered the bill, admitting, in substance, all its material allegations, and set up her claim to the entire fund as sole heir of the deceased. The defendants Willard H., Eunice L. Serotia A., Charles E., John F. Alexander answered the bill, and set up that they were entitled to receive five-sixths of the fund; and they deny the right of Josephine P. Alexander, as widow or otherwise, to have or claim any part of the fund. Edward Frank Alexander answered the bill, and admitted all the material allegations therein. He set up that he was a brother of the deceased, and prayed that the court might make proper distribution of the fund, according to equity. The administrators of the estate of the deceased filed their answers, disclaiming all interest in the fund as administrators. In addition to the facts disclosed by the pleadings, it may be proper to state that the association furnished blanks for applications, and deceased made his application, which was approved January 28, 1882. The application contains this clause: "To whom do you desire the money to be paid, in the case of death? State names, what *relations*, and how the money shall be divided. (Ans.) "To my heirs or assigns that I may hereafter elect." Three certificates were issued on same day, January 28, 1882, each in like language in that respect, in which the association "do promise and agree to pay his devisees or to the heirs at law of said Alexander," etc., sums aggregating $8,500. Alexander died intestate February 23, 1886, leaving no child or descendants of child. The Superior Court entered a decree, April 23, 1887, finding all the material allegations in the bill to be true, and that the "widow is the sole heir at law to the personal property of said

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deceased, and that said other defendants have no right, title or interest in said sum of money, or any part thereof." The decree of the trial court was affirmed in the Appellate Court.

There is no controversy in this case in regard to the facts which control the decision of the question involved. Alexander, the person named in the certificates, died intestate, leaving no child or descendant of a child; but he left a widow, father and mother, one sister and three brothers. It is not claimed, as we understand the argument, by either side, that the fund is assets belonging to the estate of the deceased which would pass to the administrators, to be used by them in the payment of debts and in the settlement of the estate, but it is conceded that the fund should be paid to the person or persons named in the certificates.

The real question for determination seems to be one of construction. In other words, what does the contract entered into between Elijah S. Alexander and the Northwestern Masonic Aid Association mean? To whom, by the terms of the contract, shall the fund be paid? In placing a construction on the contract of the parties, it must be remembered that in the use of the words named in the policies it will be presumed the parties had in view the disposition of personal assets, and not real property, as they were dealing only with the disposition of personal assets. The association, by the terms of the contract, as stated in the certificates, "within sixty days after receipt of satisfactory evidence of the death of Elijah S. Alexander," "do promise and agree to pay to his devisees, or to the heirs-at-law of said Elijah S. Alexander" the amount therein named. If Alexander had executed a will, and therein devised the fund to a person or persons therein named, such person or persons, beyond all doubt would have been entitled to the fund; but, as no will was made, there are no devisees to take, and we must now determine what was intended by the use of the words, "to the heirs-at-law of said Elijah S. Alexander." In *Richards* v. *Miller*, 62 Ill. 420, this court had occasion

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to place a construction on a clause in a will where substantially the same language was used as is contained in the certificates under consideration. There Frances Miller, a married woman, executed a will. She first directed the payment of funeral expenses and debts, after which she made various specific bequests, among which was one of $2,000 to her husband, John N. Miller. The testatrix then added a residuary clause, as follows: "I give, devise, and bequeath to my heirs-at-law the remainder of my estate." The testatrix died without children, or descendants of children, but left surviving her a husband and brothers and sisters. During the settlement of the estate a controversy arose between the husband and brothers and sisters of the deceased in regard to the construction to be placed upon the words "heirs-at-law," as used in the residuary clause of the will; and it was there held that the words employed will be presumed to have been used in their strict and primary sense, unless the context shows them to have been used in a different sense. When not thus explained, their legal and technical meaning will be enforced; that the word "heirs," unexplained by the context, will be held to mean the persons appointed by law to succeed to the estate in case of intestacy. It is then said: "Where the will gave the residue of the estate to the heirs-at-law, uncontrolled by any other words, the property must descend according to the law of the place where it is situated, and where the will is to be carried into effect." We might quote more from the opinion, which has a direct bearing on the case, but it will not be necessary to do so. The court, in plain and unmistakable language, held, that as the husband was an heir under the statute, he was entitled to share in the distribution of the estate. We are unable to distinguish this case from the one cited *supra*. The language construed in the *Miller case* was found in a will, while here the same language is found in a certificate or policy of life insurance. But that fact is of no importance. The rule of construction which should control in the

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one case should also govern in the other. The language used in the *Miller case* and in this case will be found to be identical. In the former, "I give, devise, and bequeath to my heirs-at-law the remainder of my estate;" while in the latter the language is, "do promise and agree to pay to his devisees, or to the heirs-at-law of said Elijah S. Alexander." It is, however, said, the fact that provision had been made for the widow of Alexander under other life policies, which had been made payable directly to her, may be taken into consideration in construing the certificates of insurance. It will, however, be observed that in the *Miller case* there was a special devise of $2,000 to the husband, and yet he was allowed to take as an heir under the residuary clause in the will.

Rawson v. *Rawson*, 52 Ill. 62, is also a case involving the construction of a clause in a will similar to the provision in the certificates. It provided that the remainder of the testator's property should be distributed to his heirs-at-law according to the statute of Illinois in such case made and provided. The testator left no children, but his widow, parents, brothers and sisters survived him. The court held, that under the language used the widow was entitled to take under the will, and, among other things said: "Our conclusion is that as there is nothing in the will calling for a particular or special construction upon the term 'heirs-at-law,' as used in the will, it must be interpreted according to its strict technical import; that heirs-at-law are as made so by the statute, and are the person or persons on whom the law casts the estate in case of intestacy; that the widow of the testator is within the contingencies specified in the statutes, and is the heir-at-law to this estate."

It is said, in the argument, by the use of the words "my heirs," in the application, Alexander intended to designate his next of kin, and not his widow, as the persons who should receive the amount named in the certificates. The question in the application, as heretofore stated, was as follows: "To whom do you desire

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the money to be paid, in case of death? State names what relations, and how the money shall be divided. (Ans.) To my heirs or assigns that I may hereafter elect." We do not think there is anything in the answer which discloses any intention on behalf of Alexander to have the fund upon his death to pass to his next of kin. Indeed, there is no conflict, as to the persons named as beneficiaries, between the clause in the application and the clause in the certificates of insurance. Each names his heirs. The clause in the application throws no light on the intention of Alexander which is not found in the certificates of insurance.

It is also claimed that the words "heirs-at-law" should be construed in their popular sense; "that Alexander must have intended those persons who, in common parlance, are understood to be heirs—whom the mass of mankind understand to be heirs." We do not concur in this view. It is to be presumed that Alexander knew who were meant by the words "heirs-at-law;" and when he accepted a contract containing those words, in the absence of anything in the contract manifesting a different intention, we will presume that he adopted the legal meaning those words have when used in statutes, deeds, and other instruments of writing, by persons skilled in the use of such words. *Gauch* v. *St. Louis Mutual Life Insurance Co.*, 88 Ill. 252, is a case which has an important bearing in regard to the construction to be placed upon the words involved in this case. There Gauch obtained a policy on his life, payable to "his legal heirs or assigns." He died leaving surviving him a widow and children. By his will the policy was devised to the children. The widow renounced the provisions of the will, and elected to take under the statute. It was conceded that the policy did not pass to the children under the will of Gauch; and the question arose, whether the term "legal heirs," as used in the policy, included the widow. In passing upon this question it is said: "In certain contingencies, brothers, sisters, parents, and even kindred in the remotest degree, are heirs-at-law; but it

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would be absurd in the extreme to suppose that an individual having children, who should devise his property to his 'legal heirs,' intended all his kindred should take." The legal presumption in such case would clearly be, that he intended those to whom the law would give his property, real and personal, he dying intestate; and hence it is the actual capacity of inheritance at the time of the death of the owner of the property, and not the fact that a particular person might have inherited from him under a state of facts which did not exist, that determines who is heir. If, as held in the case last cited, it is the actual capacity of inheritance at the time of the death of the owner of the property that determines who is heir, no argument is needed to establish the right of the widow in the case to hold the fund as an heir to the deceased. The law of descent (chapter 39 of the Revised Statutes, and in the third division of section 1, "Rules of Descent") provides that "when there is a widow or surviving husband, and no child or children, or descendants of a child or children, of the intestate, then, after the payment of all just debts, one-half of the real estate, and the whole of the personal estate, shall descend to such widow or surviving husband, as an absolute estate forever." This clause of the statute establishes the right of the widow to claim the fund as heir, within the meaning of the terms of the policy. If Alexander, at the time the contract of insurance was made, had intended to make provision for his parents and brothers and sisters, doubtless they would have been named as such in the certificates of insurance. It is unreasonable to suppose that he had them in mind when the contract was made, otherwise they would have been mentioned as beneficiaries. The provision in the policy for the payment of the fund to the heirs-at-law was a very natural one, indeed. When the policy was obtained Alexander had no children, it is true; but who can say that he did not intend, by the certificates of insurance, and by the use of the words "heirs-at-law," to provide for children who might be thereafter born unto him? Or, in the event

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that no living child or descendant of a child should survive him, then his widow should take the fund as sole surviving heir?

The judgment of the Appellate Court will be affirmed.

BAILEY, J., having heard this case in the Appellate Court, took no part in its decision here.

See Holland v. Taylor, 6 Am. Prob. Rep. 536, and the monographic note on changing the beneficiary of a life insurance policy by will; also Bluin v. Phaneuf, 6 Am. Prob. Rep. 326, and the cross-references.

MITCHELL *vs.* MITCHELL.

(43 Minnesota, 73)

TESTAMENTARY CAPACITY.—UNDUE INFLUENCE.—EVIDENCE.

In determining the question of undue influence upon the mind of a testator in disposing of his property by will, the frame of the will and the nature of the testamentary dispositions are in themselves important evidence.

To constitute undue influence, the testator must be so controlled by persuasion, pressure, or fraudulent contrivance that he is not left to act intelligently and voluntarily, but becomes subject to the will or purposes of others.

A testator may be affected by his prejudices and predilections arising from his associations and external influences, but if he is of sufficient testamentary capacity, he may nevertheless dispose of his property as he pleases by will, if it be his own voluntary act.

Evidence held sufficient to support the findngs of the trial court.

APPEAL from an order of the District Court of Stearns County.

D. W. Bruckart, D. T. Taylor and *H. C. Robertson*, for appellant.

O. W. Baldwin and *Reynolds & Stewart*, for respondents.

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VANDERBURGH, J. The will of James S. Mitchell, deceased, was contested in the probate court by his wife, Margaret Mitchell, on the grounds that it was not lawfully executed; that the testator was not of sound and disposing mind and memory; and that "he signed the same under duress, menace, undue influence, and fraud." From the decree of the probate court establishing the will, and admitting it to probate, the contestant appealed to the district court of Stearns county, where the case was duly tried by the court, no formal issues having been specially framed for a jury, in pursuance of the statute. Upon the trial of the case in the district court, the issues were determined in favor of the proponents, and the contestant appeals. We have carefully examined the record in the case, and are of the opinion that the findings of the court are abundantly supported by the evidence, and that there is no ground for a reversal of the order denying a new trial. The findings of fact are sufficient to cover all the points upon which the will was contested, unless a more specific finding was necessary upon the issue of fraud; but there was no evidence tending to prove fraud, unless as appearing in the evidence relied on to prove undue influence. So that the findings as made are sufficient, for the purposes of this appeal, to protect the rights of the contestant; and all the evidence in the case tending to show any attempt on the part of relatives or others to control the testamentary disposition of his property by the decedent may properly be considered upon the issue of undue influence.

The deceased was an invalid, and the subject of medical treatment for a considerable time before his death, and was nervous and irritable in consequence of his sickness; but the evidence leaves no reasonable doubt of his sanity or testamentary capacity when he executed his will. Indeed, the full, intelligent, and apparently candid statements appearing in the testimony of the witnesses to the will, and the attorney who drafted it, as well as of the physicians who attended him, is very persuasive upon the question of the alleged

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undue influence. His brother, who was with him during his sickness, testifies that before the will was made he made minutes, at the request of the testator, of the proposed disposition of his estate, and from these the attorney prepared a preliminary or skeleton draft of a will, and it was afterwards read over to the testator, and discussed between them; and it appears from the testimony that the plan of the will was then so much changed, at his dictation, that it became necessary to prepare a new one, which was thereupon done, to conform to the testator's ideas and wishes, and which was read over to him three or four times, and each clause separately and carefully explained and considered. It is sufficiently evident from the record that he was a person of intelligence, independence of mind, and decision of character, and that these characteristics were retained at the time the will was made; and, conceding that the property disposed of was his, the will, on its face, would not be deemed so unfair to contestant as to excite suspicion of undue influence.

The contestant claims, however, upon the evidence, that the estate held by him was largely the result of her own earnings and sagacity, and was in part received from her after the marriage. It is also insisted that his mind had become prejudiced against her through the interference and active influence of his relatives. The evidence shows mutual dislike between her and them, and that there was distrust on his part towards her in his last sickness; but how far his disposition towards her may have arisen from causes or differences arising between themselves, or how much he may have been affected by the prejudices of his relatives (if at all,) does not clearly appear. All these matters, including the matter of the division and disposition of his property by him, we may assume were duly considered by the trial court. There is evidence in the case indicating anxiety on the part of some of his relatives to share in his property, but it is not clear that he was influenced by this. For example, his brother testifies that while he was absent, receiving medical treatment,

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his mother wrote to him expressing her wish that he would make his will, and leave his homestead to her. On being informed of this, however, he remarked that he had always intended to give her that property. A person will be influenced, in the formation of his attachments and prejudices, by his associations, relationships, benefits or injuries received, etc. This is natural, and he may, in the exercise of his choice, dispose of his property according to his predilections thus formed. But this alone is not enough to warrant an inference of such constraint or control over his will as to amount to undue influence, though it is a circumstance proper to be considered. *Horn* v. *Pullman*, 72 N. Y. 277.

To constitute undue influence, the mind of the testator must be so controlled or affected by persuasion or pressure, artful or fraudulent contrivances, or by the insidious influence of persons in close confidential relations with him, that he is not left to act intelligently, understandingly and voluntarily, but becomes subject to the will or purposes of another. *Marx* v. *McGlynn*, 88 N. Y. 370. It is a testator's privilege to make such disposition of his property as he pleases; and, if the will is his,—that is, if it is the voluntary act of a competent testator,—it must stand, if properly executed in form. And when the proponents make a *prima facie* case of a valid will, as in this instance, the burden will rest necessarily upon the contestant to overthrow such case, and establish the undue influence complained of. We may well doubt whether, in any aspect of the case, the evidence of the contestant can be considered sufficient to support a finding in her favor on the question under consideration; but, as this case was determined after a full hearing on the merits, it is clear to us that the evidence on this issue was not sufficiently strong or conclusive to warrant us in setting aside the decision of the trial court.

Order affirmed.

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See generally as to testamentary capacity *In re* Layman's Will, 7 Am. Prob. Rep. 127, *supra*, and the cross-references; and Hammond v. Dike, 7 Am. Prob. Rep. 146, *supra*, and the cross-references. As to undue influence, see *In re* Cahill, 6 Am. Prob. Rep. 96, and the cross-references.

GILES *vs.* ANSLOW.

(128 Illinois, 187.)

CONSTRUCTION.—WORDS NECESSARY TO CREATE A FEE. —PRECATORY TRUSTS.

When there is an absolute power of disposal with the confidence expressed that the donee will dispose of the property according to the testator's wishes, none being expressed, there is no trust.

APPEAL from a decree of the Circuit Court of Tazewell County. The facts appear in the opinion.

B. S. Prettyman, for plaintiffs in error.

A. B. Sawyer & Wm. Don Maus, for defendants in error.

SHOPE, J. This bill was filed for the purpose of obtaining a construction of the last will and testament of Richard Anslow, deceased. It may be premised that whatever estate was devised was subject to the payment of the testator's lawful debts.

The portion of the will involved in this construction, and necessary to an understanding of what will follow, is: "To my beloved wife, Mary Anslow, I do give and bequeath all of which I die possessed, both real and personal. My real estate so far as now known, is described as follows:" [here follows a description of lands.] "and I do hereby appoint her (my beloved wife) my sole executor, who is to enter upon and discharge said duties, without giving of bond, and free from all restraint. It is further my will, that in case

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of the death of my wife, Mary, before the settlement of my estate, that my property, of which I die possessed, shall be equally divided between my two nephews, Edward Charles Giles and Richard A. Giles. I have full confidence in my beloved wife, Mary, that she will do what is best and proper with my effects, and that she would do with my property the same as I would wish to have done—that she will take care of the proceeds. She is, by this gift, free from all restraint to do as may seem to her best and proper."

The settlement referred to, which should operate to defeat the devise to the wife, was a settlement or adjustment of the estate in due course of administration in the probate court. The clause "that in case of the death of my wife, Mary, before the settlement of my estate," can refer to nothing other than the adjustment of the affairs of the estate, by which its debts are paid, its credits collected, and the residue distributed to the persons entitled to take the same under the will. (*Calkins' Exr.* v. *Smith et al.*, 41 Mich. 409, 1 N. W. Rep. 1048) To enable the widow to thus settle the estate, she was made sole executrix, and was authorized to enter upon the discharge of her duties as executrix, "free from all restraint." The settlement of the estate in her lifetime was a condition upon which the devise to her depended. Until such settlement it must remain uncertain what amount was devised. It might be necessary to make sale of the lands, or some part of them, to adjust claims against the estate. When, however, the administration was completed and closed, her rights became fixed and determined. If made during her lifetime she took the estate absolutely; if not, it went to the nephews named. The bill alleges her appointment as executrix by the proper court, the due administration of the estate, final settlement, and discharge of the executrix by the court. The decree finds the allegation of the bill to be true. There being no bill of exceptions or certificate of evidence preserving the evidence heard by the trial court, and it appearing by recitals in the decree, that the cause was heard upon

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"the proofs, oral and documentary, offered by the complainant on the hearing," it must be assumed that a final settlement of the estate had been made prior to the filing of the bill herein, and in the lifetime of Mary Anslow, widow of the testator.

The thirteenth section of the Conveyance act provides: "Every estate in land which shall be granted, conveyed, or devised, although other words heretofore necessary to transfer an estate of inheritance be not added, shall be deemed a fee-simple estate of inheritance, if a less estate be not limited by express words, or do not appear to have been granted, conveyed, or devised by construction or operation of law." Under this statute the first clause of the will before us is clearly sufficient to invest the widow with an absolute estate in fee, and we must hold that she took such an estate, unless the subsequent clauses of the will show a contrary intention. The intention of the testator, which must govern, is to be ascertained from the whole will. If it was intended that a less estate should be taken by the wife, it is wholly immaterial in what part of the will such intention is manifested. It is, however, the disposition of courts to adopt such a construction as will give an estate of inheritance to the first donee. *Leiter* v. *Shepard*, 85 Ill. 243; *Sherman* v. *Wooster*, 26 Iowa, 277; 1 Redf. Wills (3rd ed.) 421, 422. When, therefore, the fee is devised by a clause or clauses of a will, and other portions or clauses are relied upon as limiting or qualifying the estate thus given, they should be such as show a clear intention on the part of the testator to thus limit or qualify the estate granted. Such an intent should clearly and unequivocally appear. See *Walker* v. *Prichard*, 121 Ill. 221, 12 N. E. Rep. 336; *Jones* v. *Jones*, 124 Ill. 254, 15 N. E. Rep. 751.

The clause of the will, devising the estate to the two nephews of the testator in the event of the death of the widow before the settlement of the estate, cannot be held in any manner to affect the devise to the widow. The devise to the nephews was contingent, depending on the happening of an event, which, by the settlement

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of the estate during the lifetime of the widow, became impossible. Upon final settlement of the estate in the county court the devise to the widow ceased to be conditional, and the condition on which the nephews were to take failed.

The clause of the will following the provision for the disposition of the estate upon the death of the widow before the settlement of the estate, is relied on as limiting the estate of the wife to her life, and as creating a trust in the lands devised in favor of the nephews. There can be no doubt that a trust may be thus impressed upon the subject of the devise, but an intent to create the trust must clearly appear. If the intention of the testator be doubtful, precatory words will not be construed into a declaration of a trust. (Theob. Wills, 379.) It is there said: "Therefore mere expressions of a desire that the donee will be kind to, (*Buggins* v. *Yates*, 9 Mod. 122; 8 Vin. Abr. 72 pl. 27,) remember, (*Bardswell* v. *Bardswell*, 9 Sim. 319,) consider, (*Sale* v. *Moore*, 1 Sim. 534,) deal justly by, (*Pope* v. *Pope*, 10 Sim. 1,) educate and provide for, (*Macnab* v. *Whitbread*, 17 Beav. 299; *Winch* v. *Brutton*, 14 Sim. 379; *Fox* v. *Fox*, 27 Beav. 301,) or do justice to (*Ellis* v. *Ellis*, 23 Wkly. Rep. 382) a certain class of persons, will raise no trust."

In the absence of words showing a contrary intent, a gift, whether of land or personal property, will be presumed to be absolute, and before it will be held to be in trust it must be clear that the testator intended the property bequeathed, or some part of it, to be applied by the donee for the purpose of the trust; and this is to be determined, as before stated, from a consideration of the entire will, and the circumstances and condition of the estate devised. So the fact that personal property was included in the devise to the wife, and was expected by the testator to go with the real estate to her, may be considered as indicative of an intent to give her an absolute estate in the land. Hawk. Wills, 131, and cases cited; *Leiter* v. *Sheppard*, *supra*.

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The author already quoted from (page 381) states the doctrine in respect of the creation of trusts, as follows: "No trust will be implied from precatory words (*a*) where the donee may, at his discretion, apply the property to other purposes, (*Lefroy* v. *Flood*, 4 Ir. Ch. 1; *Curtis* v. *Rippon*, 5 Madd. 434; *House* v. *House*, 23 Wkly. Rep. 22; *Ex parte Payne*, 2 Younge & C. 636;) (*b*) or where there is an express direction that the donee's absolute interest is not to be curtailed. *Huskinson* v. *Bridge*, 15 Jur. 738; *Eaton* v. *Watts*, L. R. 4 Eq. 151;) (*c*) where the precatory words are stated not to be obligatory, (*Young* v. *Martin*, 2 Younge & C. Ch. 582; *Shepherd* v. *Nottidge*, 2 Johns. & H. 766; *Cole* v. *Hawes*, L. R. 4 Ch. Div. 238;) (*d*), or where the donee is to take free and unfettered, (*Meredith* v. *Heneage*, 1 Sim. 542; *Hoy* v. *Master*, 6 Sim. 568; *White* v. *Briggs*, 15 Sim. 33.")

In Jarm. on Wills (page 388) it is thus stated: "And when the words of a gift expressly point to an absolute enjoyment by the donee himself, the natural construction of subsequent precatory words is, that they express the testator's belief or wish without imposing a trust. Thus, in *Meredith* v. *Heneage*, 1 Sim. 542, where the testator, after having given his real and personal estate in the fullest terms to his wife, declared that he had devised the whole of his real and personal estate to his wife unfettered and unlimited, in full confidence, and with the firmest persuasion that in her future disposition and distribution thereof she would distinguish the heirs of his late father by devising and bequeathing the whole of his said estate, together and entire, to such of his said father's heirs as she might think best deserved her preference, it was held that the wife was absolutely entitled for her own benefit, Lord ELDON considering that the testator intended to impose a moral, but not a legal, obligation on his wife, for which he relied much (as did also Lord REDESDALE,) on the words "unfettered and unlimited." See, also, 2 Story, Eq. Jur. § 1070.

The rule stated in 2 Redf. Wills, 418, as follows: "It seems clear that, when the expression of request or de-

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sire in the will is ever so strong, it will not be construed to create a trust for others, when the will contains an expression that the devisee is, nevertheless, to be free to act in his own discretion."

The clause relied on in this case as containing such precatory words as will create a trust, is as follows: "I have full faith and confidence in my beloved wife, Mary, that she will do what is best and proper with my effects, and that she would do with my property the same as I would wish to have done,—that she will take care of the proceeds." For whose benefit did he expect her to manage the estate and take care of the proceeds of the property? Manifestly for her own benefit, and guard against improvidence and consequent destitution and want. There is not the slightest intimation that such care was to be exercised in the interest of any other beneficiary. No provision is made in favor of the nephews, or any other person, after the estate should have vested in the widow. The clause last quoted is immediately followed by the words: "She is, by this gift, free from all restraint to do as may seem to her best and proper." The testator had previously left her "free from all restraint," in the discharge of her duties as executrix of his will. She was to be free from all restraint, in the settlement of the estate, and she was left free from all restraint to do with the subject of the "gift" as might, in her discretion, seem best and proper. No desire or even recommendation is expressed that she should make any disposition of any part of the proceeds of the estate to or for the nephews, or to any other person or use, or the expression of a desire that they should have a claim on her bounty or generosity. It is difficult to imagine that there is here any precatory words employed expressing a wish that the nephews should receive any portion of the estate of the testator after it became vested in the first devisee, or that they should become the objects of her bounty. "Where there is an absolute power of disposal, with the confidence expressed that the donee will dispose of the property ac-

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cording to the testator's wishes, where none are expressed, there is no trust." (Theod. Wills, 380, and cases cited.) There is no limitation expressly creating a life-estate in the wife of the testator. Nor is there a limitation over for the benefit of the nephews, either express or that arises by implication from the language employed. (*Hamlin* v. *Express Co.*, 107 Ill. 448.) By the first clause of the will the absolute estate in the property is devised to the wife, and, apparently to prevent any mistake or misapprehension arising from the clause inserted in respect of the disposition of the estate upon her death, before final settlement, she is, by the last clause, given absolute dominion and control over it. She is freed from all restraint in the use of the gift, or in doing with it as she should see proper. In other words, she was first given the property absolutely and in fee, upon the happening of the event of a settlement of the estate during her life, and then, upon the contingency of its vesting in her, she is left, "unlimited and unfettered" in the dominion, control and disposition of the estate. The case clearly falls within the rule announced by the authorities cited, and the principal devisee, the wife of the testator, upon the settlement of the estate, took absolutely the property remaining. We are not justified in creating a limitation upon a devise to the wife by construction; nor, in our opinion, does any such limitation arise by implication from the language of the will. We are of opinion that the circuit court decided correctly, and that its decree should be affirmed, which is accordingly done.

Decree affirmed.

See, as to precatory trusts, Colton v. Colton, 6 Am. Prob. Rep. 11 and the monographic note and cross-references; also Bills v. Bills, 7 Am. Prob. Rep. 135, *supra*.

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SUCCESSION OF DAUTERIVE.

(39 Louisiana Annual, 1092.)

NUNCUPATIVE WILL. — WITNESSES. — COMPETENCY. — IGNORANCE OF CONTENTS.

A will executed in the country, and purporting to be a nuncupative testament under private signature in the presence of three witnesses only, one of whom did not understand the language in which the testator expressed himself, and the will was drawn up, is invalid.

A nuncupative will under private signature, executed before two competent witnesses only, is invalid.

The law disqualifies as witness to a testament a person who is deaf. A witness who does not understand the language in which the will is dictated and written down is intellectually deaf, and, practically, is as though he had not attended at all.

The circumstance that, while it was being dictated, what was then said had been translated to that witness, does not supply the want of knowledge of the latter.

APPEAL from a judgment of the District Court of the Parish of St. Bernard.

Sambola & Ducros, for appellant.

R. T. Beauregard and *H. Chiapella*, for the appellees.

BERMUDEZ, C. J. This is an appeal from a decree ordering the execution of the will of the deceased, as being in the nuncupative form, under private signature.

The objections urged against its validity are: *That* it was executed in the presence of *three* witnesses in the county, where more could have been obtained, and *that* one of those witnesses neither understood nor spoke the French language, in which the will was framed.

It is unnecessary to pass upon the first objection.

As to the second, it is fatal to the validity of the will. The evidence conclusively shows that the witness Main did not understand or speak the French language. It is, however, contended that as the will was translated

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to him in English, by another witness, while the testator was uttering his intentions—this ceremony supplies the absence of knowledge of the language. There might be some plausibility in the retort had the will been translated, not only at the time it was being taken down, but also when it was read to the testator, if he understood the English language; but it does not appear that this was done. The law is emphatic. It disqualifies a person who is *deaf* as a witness to testaments, and it exacts that its requirements, touching the formalities to which wills are subjected, be strictly observed, under pain of nullity. Rev. Civil Code, 1591, 1595. Under the Roman, the French and the Spanish law, knowledge of the language in which the will is dictated and written down is deemed indispensable for the validity of the will, when, to be valid, it must have been executed in the presence of witnesses. Malkeldey, § 642; 1 Febrero, No. 12 and 16; 4 Marcade, 42; 5 Toullier, No. 393; 9 Duranton, 113, No. 79; Saintespes Lescot Donat. p. 97, No. 1,038; 2 Mourlon, No. 785; 21 Demolombe, No. 196, 197, 251; 13 Laurent, No. 268; Merlin vo. Test. (Quest. de Droit,) XVII., art. 2.

In *Hebert* v. *Hebert*, 11 La. 364, and *Beaux* v. *Gallusseaux*, 14 La. Ann. 233, in this state, it has been held that a witness who does not understand the language in which the will is couched is incompetent, and the testament is a nullity.

Had the witness Main, in the instant case, when interrogated, been asked to state his knowledge of the contents of the will, as acquired from the reading *only*, and not from the translation, whatever it be, previously made to him, assuredly he would have remained perfectly dumb. From a legal standpoint, he was intellectually deaf, and disqualified from service. It is apparent that it was impossible for him to have compared the translation in English with what was read in French, and that, as to him, the will was no more read than if he had not been at all in attendance. It does not appear that the testator understood the English language, and that he was on that account able to as-

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certain whether the translation was or was not faithful.

While fully appreciating the utterance of our immediate predecessors touching the sacredness of the will of the departed donees, which should be respected as their graves, (30 Ann. 217) we cannot say that the ceremonies observed at the making of what is termed the will of the deceased have impressed upon it a sanctity which shields it from the assault now made, and we are driven to the necessity of declaring that, one of the three subscribing witnesses being incompetent, the ceremony has taken place before *two* witnesses only, while the law imperiously requires that *three*, at least should attest its execution.

The pretended will must, therefore, be considered as having never been made, and having no legal existence.

It is, therefore, ordered and decreed that the judgment appealed from be reversed, and that the application for the probate and execution of the will be rejected, with costs in both courts.

See Carroll v. Bonham, 5 Am. Prob. Rep. 389, and monographic note.

NELSON'S WILL.

STOCKTON *vs.* THORN.

(39 Minnesota, 204.)

UNDUE INFLUENCE. — EVIDENCE. — EXPERTS. — REVOCATION OF FORMER WILLS.

The fact that a person who had made two wills, dividing his property between his wife and his sister, within a few days after making the second, and after several days of very severe illness of which he died in a few hours, made another will revoking those made before, and leaving all his property to his wife, (no reason being apparent for the change in the disposition of his property,) is not, in the absence of any other evidence of undue influence, sufficient to require the

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issue of undue influence on the part of the wife to be submitted to the jury.

The question whether a change in a testator's life-long purpose to provide for a sister, occurring upon his death-bed, and without apparent motive or reason, and unexplained, indicates any change in his intellect, is not one for the opinion of experts.

APPEAL from a judgment of the District Court of Hennepin County.

Flandrau, Squires & Cutcheon, for appellants.

Wilson & Lawrence for respondent

GILFILLAN, C.J. In January, 1886, the will of the late Col. Anderson D. Nelson was presented for probate in the probate court of Hennepin county. The sister of deceased, Mrs. Matilda J. Stockton, and John M. Stockton, her husband, appeared and contested. The probate court having allowed the will, the contestants appealed to the district court, where, after a trial before a jury, the allowance and order of the probate court was affirmed, and from the judgment of the district court the contestants appeal to this court.

For the purpose of trial in the district court, three issues were prepared: *First*, as to the actual due execution of the will; *second*, as to soundness of mind and competency to make a will on the part of the deceased at the time it purports to have been signed; *third*, as to whether deceased was induced or procured to sign the will by threats, fraud, or oppression, or by the use of any undue influence. After the evidence was all in, it being full and uncontradicted that deceased executed (in fact) the will, the court directed the jury to find on the first issue in the affirmative. No exception is made, and none could be to that. As to the third issue, the court, being of opinion that there was no evidence to sustain a verdict in the affirmative upon it, directed the jury to find in the negative. The propriety of that direction is made one of the questions on this appeal. The second issue was fully submitted to the jury for them to find upon it; and they found that de-

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ceased was, at the time the will purports to have been signed, of sound and disposing mind and memory, and competent to make a will.

Upon a careful examination of the evidence in the case, we do not find any upon which a verdict that the deceased was induced to execute the will by threats, fraud, oppression, or undue influence would be permitted to stand. "That is undue influence which amounts to constraint; which substitutes the will of another for that of the testator. It may be either through threats or fraud; but, however exercised, it must, in order to avoid a will, destroy the free agency of the testator at the time when the instrument was made." *Conley* v. *Nailor*, 118 U. S. 127 (6 Sup. Ct. Rep. 1001.) It is "a coercion produced by importunity, or by a silent resistless power which the strong will often exercises over the weak and infirm, and which could not be resisted, so that the motive was tantamount to force or fear." *Children's Aid Society* v. *Loveridge*, 70 N. Y. 387. These two quotations give as good an idea of what is not easily defined, "undue influence," as any we find. Merely urging considerations of gratitude, love, esteem, affection, or charity, so that the mind of the testator is left free to act and arrive at its own conclusions, is legitimate. These motives are entitled to their proper weight, and it is for the testator to determine how far they shall influence him in disposing of his property. To make a case of undue influence, the will must express the mind and intent of some one else, and not of the testator. From the nature of the case, the evidence of undue influence will generally be mainly circumstantial. It is not usually exercised openly, in the presence of others, so that it may be directly proved. But the circumstances relied on to show it must be such as, taken altogether, point unmistakably to the fact that the mind of the testator was subjected to that of some other person, so that the will is that of the latter, and not of the former; mere ground of conjecture or guess is not enough.

In this case the only person as to whom there could

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be any pretext for charging undue influence over the testator was proponent, the wife of the testator. The facts relied on are, stating them briefly, these: The testator, an officer of the army, lived to the age of 57 without being married In 1876 he married the proponent, then at the age of 27. The evidence indicates that their married life was happy. He had acquired considerable property, consisting mainly of real estate lying in Minneapolis and near St. Paul. He had always been very fond of his sister, Mrs. Stockton, and of her husband and children, and for many years had been very generous towards them, providing them from time to time with money to a large amount in the aggregate, interesting himself in the education of the children, and expressing an intention to provide for their future. His affection for and interest in the welfare of his sister and her family, and his intentions towards them, and with respect to the disposition of his property after his death, may be summed up by stating the facts that, within little more than a year and a half before his death, he executed two wills, prior to that in contest. One, executed June 11, 1884, in which, after some unimportant bequests, he devised and bequeathed one-half of his real and personal property to his wife, and the other half to Mrs. Stockton and her issue, the whole to go to her or them in case his wife should die before he did; the will, giving as the reason for so disposing of his property, that his wife will be amply provided with pecuniary means from another source, while his sister, with her large family, was in much need of the help which he purposed extending to her. He executed another will at the house of Mrs. Stockton, in Kentucky, December 7, 1885, about 22 days before he died. This will was drawn with his own hand, and its provisions do not seem to have been disclosed to any one till after his death. By this will he devised to his wife a building in Minneapolis worth about $65,000; made a single bequest of his books; and directs the remainder of his property in Minneapolis and St. Paul to be sold, and the proceeds, with his

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money in bank, to be equally divided between his wife and Mrs. Stockton; all other of his effects to go to his wife. No reason is apparent for the very considerable change made by this will in the disposition of his property. Contestants do not suggest any mental infirmity or undue influence as affecting its validity, but, on the contrary, in their written objections to the later will, they set forth its execution, and allege it to be the last, and only valid will of the testator. The will in contest was executed at Thomasville, Ga., December 29, 1885, the day before his death, and it leaves his entire property to his wife. He had been very sick of pleuro-pneumonia, at that place, continuously, since December 20th. The will was executed at six or half-past six in the evening, and at about four the next morning he died.

The theory urged by the contestants is that, prior to his illness, his wife had acquired a controlling influence over him; that his illness weakened his mind and power of will to such an extent that she, being in constant and almost exclusive attendance on him, took advantage of her influence over him, and of his weakness, physical and mental, to extort from him the execution of a will such as he would not otherwise have made. There is nothing in the evidence to indicate that she ever had any power to influence him beyond what naturally and rightfully belongs to a wife. Indeed, there is a notable lack of evidence showing their standing in that respect towards each other. There was no attempt to open out their domestic life prior to a few weeks before he died. There is no evidence tending to show that he was not a man of strong, independent will, that he could be easily influenced by any one. There is evidence that his sight and hearing, and perhaps his memory, were impaired, though not beyond what is common to men of his age. That his sickness weakened in any way his mind and power of will there was no evidence, except that of experts—physicians who did not see him, but who testified that usually the disease of which he died, continuing so long as in his case,

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would have such effect on the brain and mind as to render the patient incapable of making a will. When the question is mental condition during such a disease, that sort of evidence is competent, and entitled to control, where no better can be had. But as against the ample, direct and positive evidence of the attending physician, and all those who saw and conversed with the testator during his illness, and at the time of executing the will, to the effect that his mind was no way impaired, the testimony of the experts was entitled to very little weight. On the issue of mental infirmity, the evidence barely justified its submission to the jury.

But the case is utterly barren of evidence tending to prove that Mrs. Nelson ever made any effort or attempt to influence the testator in disposing of his property. "It is not sufficient to show that a party benefited by a will had the motive and opportunity to exert such influence; there must be evidence that he did exert it." *Cudney* v. *Cudney*, 68 N. Y. 148. Not a word or act of hers, proved, could be construed into such an attempt. Her own testimony was to the effect that the year they were married he told her of a will he had made; but that never after that did they have any conversation with regard to the disposition of his property, until the day the contested will was executed. As to the conversation on that day, her testimony was that, when he was dictating to his friend, Gen. Thom, what disposition he wished to make of his property, she requested him to wait until he was well enough to attend to business matters, but he persisted. Nor is there any evidence tending to show that she ever tried to alienate him from contestants or their family. Upon the issue of undue influence the case stands, then, solely on the facts that, having intended to provide for, and having executed prior wills making provision for his sister and her family, he, within a few weeks, made another will, revoking in effect all others, and leaving all his property to his wife. That being so, it comes within the principle affirmed in the case of *Storer's Will*, 28 Minn. (98 N. W. Rep. 827), in which it was held that in-

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equality, however great, in the distribution of the testator's property among those naturally the objects of his bounty, is not, of itself, or even when accompanied with evidence tending to prove impaired mind and memory, evidence of undue influence on the part of those who seem to be favored by the will, though it may be shown in aid of other independent evidence of it. As was said in that case: "If it were evidence from which the jury might find undue influence to avoid the will, the issue practically presented to the jury in every case of the kind would be, is the will such as the jury, if in the testator's circumstances, would have made? Few wills could stand if such were the test."

Upon the issue of mental capacity to make a will, the court, at the request of the proponent, gave to the jury seventeen different instructions covering, with the court's modifications and explanations of them, more than four printed pages, containing various propositions of law, some of which, certainly, cannot be questioned, and are not questioned. To this the only exception was, "We except to the giving of proponent's requests which were given by the court." We have so often held that an exception to a charge must be to some particular proposition stated by the court, and which must be pointed out so that the attention of the court will be specifically directed to the point, and that a general wholesale exception will be of no avail, that it is unnecessary for us to do more than refer to the rule, and say the exception is insufficient. We will, however, though unnecessary, go further, and say that, although the phraseology of two or three of the requests may be open to criticism, the explanations of the court accompanying them, and especially its summing up of the law, after giving the requests, are so full, and in so clear, precise and accurate terms, that the jury could not have got any but a correct understanding of the rules of law applicable to such a case.

There were some exceptions upon the exclusion or admission of evidence, only two of which, however, deserve special notice. The contestants asked of several

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of their witnesses, physicians, the question, in substance, whether, in their opinion, the change of the testator's life-long purpose to provide for his sister, occurring upon his death-bed, and being without apparent motive or reason, and otherwise altogether unexplained, would indicate any change in his intellect. We suppose the purpose of the question was to show a weakening of the intellect. It was not a question of the effect of physical disease on the mind. As to that the medical witnesses might and did answer. It was a question whether certain mental acts or operations indicated a strong or weak mind. Of that the jury were as competent judges as the most skilful physicians. It was not a matter of science. The question was correctly excluded. From the depositions of several of contestant's witnesses the court, on proponent's motion, struck out portions which contestants claim would show that, when the testator's remains were taken for burial to the place where contestants resided, and at the burial, proponent acted in an unbecoming manner, one showing animosity to contestants, and a desire to avoid them. Upon reading the evidence so struck out, we do not think it would show what contestants claim for it; but, if it did, it could certainly have no bearing upon the testator's mental capacity, and it would not, with the evidence admitted, make a case for the jury on the issue of undue influence; so that, if admitted, it could not have helped their case.

Judgment affirmed.

See *In re* Cahill, 6 Am. Prob. Rep. 96, and the cross-references.

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BULLARD *vs.* CHANDLER.

(149 Massachusetts, 532.)

ABSOLUTE AND QUALIFIED LEGACIES.—BILLS FOR INSTRUCTIONS.—PUBLIC AND PRIVATE CHARITIES.

Words in the same clause qualifying an absolute bequest are not to be rejected under the rule that an absolute estate is not to be cut down by a subsequent gift inconsistent therewith.

A bequest to a married woman in the event of her becoming a widow, or otherwise becoming "lawfully separated" from her husband, being at most only an inducement to the wife to assert her legal right to a divorce, cannot be said to be against public policy.

A trustee has a right to ask for the instructions of the court only in regard to present contingencies.

A bequest invested with the character of a public charity, does not become a private trust because of certain persons of the class to be aided being specified, nor because of the testatrix employing the words "strictly for private charities."

BILL for instructions in the Supreme Judicial Court of Suffolk County. The facts appear in the opinion.

W. G. Russell, S. S. Shaw, J. Willard, J. O. Shaw, Jr., M. P. White, G. P. Sanger, Jr., for heirs-at-law and next of kin.

W. H. Atwood and *G. G. Pratt*, for First Parish in Shirley and for town of Shirley.

A. S. Wheeler, for Mr. Chandler.

H. C. Bliss, for the Commonwealth.

DEVENS, J. This is a bill for instructions filed by the executors of the will of Mary D. Whitney, as to the interpretation to be given to two paragraphs therein numbered, respectively, "secondly" and "fourteenthly." The first of these paragraphs is as follows: "*Secondly.* I give and bequeath to my friend Rev. Seth Chandler, of Shirley, the sum of five thousand dollars ($5,000), which after his death shall revert to the town afore named, [the town of Shirley,] strictly on this condition, namely: That said town shall support fairly and permanently a Unitarian clergyman, in which case all interest accruing on above sum shall be used to aid in payment of his salary, failing which it shall revert

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to my heirs at law." It is contended on behalf of Mr. Chandler that he is entitled to have the $5,000 paid to him as his absolute estate, upon the ground that the gift to him is absolute in its terms, and that any limitation afterwards is repugnant and void. We are not disposed to question the correctness of the rule that where an estate is absolutely given it cannot be cut down to a less estate by subsequent words inconsistent therewith. *Merrill* v. *Emery*, 10 Pick. 511; *Sherburne* v. *Sischo*, 143 Mass. 439, 9 N. E. Rep. 797. But, in determining whether an absolute estate was given, it is important to consider the whole clause by which it was made and the other portions of the will. It would hardly be contended that if the gift to Mr. Chandler had been followed by "during his life," or some similar phrase, that the preceding words, which, if they stood alone, would import an absolute gift, could be separated from their immediate context. The word "revert" is obviously used in the sense of "go" or "pass;" and the phrase, "which after his death shall revert," etc., states that the sum of $5,000 is to go to the town of Shirley after his death, as the pronoun "which" can refer to nothing but this sum. Unless Mr. Chandler's estate therein is limited to his life, this could not possibly happen. Again, the testatrix, after providing for the condition, as she terms it, upon which the sum shall go to the town, adds: "In which case all interest accruing on above sum shall be used to aid in payment of his salary, failing which, it shall revert to my heirs-at-law." By the use of the words "above sum" she provides that the interest on the $5,000 shall go to the support of the clergyman, and that, if it shall fail that he is supported, the same sum shall go to her heirs-at-law; contemplating throughout the whole clause that this sum is to be kept intact, and that the income thereof only used by those who may receive the benefit of it. There would certainly be nothing on which the latter portion of the clause could operate, if the contention on behalf of Mr. Chandler is correct. It must be held, not as a limitation subsequently made, and therefore repugnant to the gift, but

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as a limitation to the gift as made, and thus qualifying and defining it. All to which Mr. Chandler is entitled therefore is the income of the sum of $5,000. *Rogers* v. *American Board of Commissioners*, 5 Allen, 69. Of this sum the testatrix has at his decease undertaken to make an absolute and final disposition. No case is therefore presented such as arises where the first taker is made the owner of a fund subject to a contingent limitation over upon the occurrence of a certain event, where the money is usually paid to him, as it is his, and as the contingency may never happen, and where, if there is danger that it will be wasted, proper security may be required or a trustee appointed The general rule is here applicable, that in bequests of money or personal property for life, with a bequest over, the first legatee takes the interest or income only, and, in the absence of any expressd intention, the property is either paid to a trustee or held by the executor as such. *Hooper* v. *Bradbury*, 133 Mass. 303. The executors are, by the terms of the will, appointed trustees, and, as a trust arises in regard to this sum, they should hold it as such during the life of Mr. Chandler, properly investing the same, and paying him the income thereof. This is the only inquiry which concerns the immediate and present duty of the executors.

The bill further requests instructions as to whether the town of Shirley "takes any interest in said sum if it should comply with the conditions specified, or whether said sum shall be paid to the heirs at law or distributees of the testatrix, or fall into the residue, as disposed of in the fourteenth clause of said will, or what other legal disposition is to be made of said sum." Under this request, various questions have been argued before us as to the ultimate disposal of the fund of $5,000. It has been contended on behalf of the town that it may take this fund, and administer the trust, and also that it may receive the fund, and, the "condition" being illegal and impossible of execution by it, may take it discharged of the condition; and on be-

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half of the First Parish in Shirley, that the town of Shirley cannot take the property as trustee, and that, as the gift is to a public charity, it will not be allowed to fail, but the court will frame a scheme to carry out the charitable intent of the testatrix as nearly as possible, appointing a new trustee for this purpose, and the First Parish offers to accept the gift and comply with the conditions on being allowed to add the income of the fund to its own funds devoted to the same charity. On behalf of the heirs-at-law and next of kin of the testatrix, it has been urged that the town cannot take on the condition or for the purpose proposed, and that the parish cannot be enabled to take by interpreting the conditional or limited gift of the testatrix as a general gift, to promote Unitarian preaching in the town of Shirley, and therefore at the death of Mr. Chandler the words used by the testatrix, "failing which it shall revert to my heirs-at-law," will immediately take effect. It would be premature to discuss these and similar questions before the life-interest of Mr. Chandler expires. It has been often held that one of the principal requisites for the maintenance of a bill for instructions is the fiduciary possession of a fund of which some disposition is required to be made presently. *Putnam* v. *Callamore*, 109 Mass. 509; *Muldoon* v. *Muldoon*, 133 Mass. 111; *Wilbur* v. *Maxam*, Id. 541. In *Minot* v. *Taylor*, 129 Mass. 160, a testator had devised property in trust to pay the income to A. for life, with remainder to his children for life, and on their death to pay the principal to A.'s grandchildren on their respectively coming of age. At the death of the testator, A. had one child living who was then unmarried. At the death of A. this child had children living. It was held that the trustee could not ask the instruction of the court on the question whether the devise to the grandchildren was void for remoteness, until the death of A. A trustee has a right to ask the instruction of the court as to his present duties, but not as to what may be his duty in future contingencies. Whether the powers and duties of towns or

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of the town of Shirley will be controlled, when the life-interest terminates, by the same legislation which now prevails, or whether at that time the First Parish in Shirley will occupy the same relation to religious instruction which it now holds, we cannot say. It is highly probable, certainly, that persons other than those represented before us as the heirs-at-law and next of kin will then be entitled to be heard. For the immediate duty of the trustees, the instruction already given is sufficient.

The fourteenth paragraph of the will is as follows: "*Fourteenthly.* After the above-willed division of my estate, should there be still property remaining, (to which would be added the legacy or legacies of any person or persons named in article twelfthly, not living at the time of my decease,) I wish it to constitute a fund, to be well invested, the income from which I desire my sisters to apply to the relief and comfort of the poor and unfortunate, whom we have aided in past years, and also to others as their judgment may dictate. It is strictly for private charities, and may be known to them, as I consider it as the 'James and George Fund.' It is the best monument I can erect for them. If, on the contrary, my property should have shrunk so far as to make it impossible to carry out all the above-named plans, I wish my sisters, nephews, and nieces to be paid in full, and the remainder to be divided *pro rata*."

Upon this paragraph the question, on which all subordinate inquiries depend, it is whether this gift of income to the three sisters is a gift to them of property to be distributed by them for charitable purposes, in the legal sense of the term. The question is primarily one of construction, and the important phrase is one as to the meaning of which we cannot be much aided by precedents, on account of the varieties of phraseology. If it was simply the gift of a sum of money, the residue of her estate, the income of which was to be distributed by her sisters solely to the poor and unfortunate, there would be no doubt that it came within

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the class of public charities, and, if they were unwilling to execute the trust, it might be executed by others. *Minot* v. *Baker*, 147 Mass. 348, 17 N. E. Rep. 839. It is the contention of the heirs that this clause provides for the distribution to a class not the proper objects of charity, as well as those who are so, and that thus the whole gift is rendered void. *Nichols* v. *Allen*, 130 Mass. 211, 213. The testatrix provides for a fund to be well invested, the income of which she desires her sisters "to apply to the relief and comfort of the poor and unfortunate." If the sentence had stopped there, it would not have been contended that any but a charitable use could have been made of the fund. They are followed by the words, "whom we have aided in past years, and also to others as their judgment may dictate." It is said that the word "others" means, not merely others than those we have aided in past years, but "others" than "the poor and unfortunate." This is not so natural a construction as that which treats the first clause describing the beneficiaries together as "the poor and unfortunate," and then dividing them into two classes, those we have aided in past years, and those other than they, who are also poor and unfortunate. The word "others," in clauses like this, refers to the last antecedent, unless there is something in the subject matter which requires a different construction. *Cushing* v. *Worrick*, 9 Gray, 382. Its meaning, as thus referred, is "others" than those "whom we have aided," and not "others" than "the poor and unfortunate." It is thus with its immediate antecedent, "those whom we have aided," brought within the description of the general class, "the poor and unfortunate," to whom the sisters are authorized to distribute the income of the fund which the testatrix has created. Nor do the words, "as their judgment may dictate," empower the sisters to give to any outside this class, but only to make their selection within it. That a gift should be charitable, there must be some benefit to be conferred upon, or duty to be performed towards, the public at large, or some part thereof, or an indefinite class of persons.

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A bequest for the aid or benefit of defined persons is not a charity, but a trust only, as a gift to be distributed among certain poor families named, or certain persons identified in the bequest. *Thomas* v. *Howell*, L. R. 18 Eq. 198, 209; *Liley* v. *Hey*, 1 Hare, 580.

But a gift of a nature such as that of the testatrix does not cease to be a charity because certain persons are named as of the class to be assisted, or even because provision is made that a preference shall be accorded them in the distribution of her bounty. When they are thus provided for as a part of the poor who are to receive the benefit of the donation, its public object and purpose continue, and it is still invested with the character of a public charity. While there is no bequest of the principal to the sisters in terms, or any words of succession which indicate who is to administer the fund after them, the testatrix provides clearly for the formation of a fund which the whole context of the sentence shows is intended to be permanent in its character. It is to be well invested, and the income is to be applied by them. She speaks of it as the best monument she can erect for her deceased children, and bestows on it their Christian names jointly. There is no bequest of this fund to the sisters, who had been carefully provided for in other parts of the will, and the payment of whose legacies is guarded by the last clause of the fourteenth paragraph. The trustees appointed by the will are expected to hold it, although there is no express donation to them. To the sisters is given the right, first, to distribute the income, and through them, in the first instance, the charitable purpose is to be executed. Although the testatrix does not expressly provide for the appointment of others by whom the income shall be distributed, when they shall decease, or, if they shall refuse or neglect the duty she has imposed upon them, it cannot be that she expected it would fail. The application of the income of this fund to charity was her dominant object. Having created it, placed it in custody of trustees, confided the distribution of the income to her sisters, de-

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voted to it the residuum of her estate, and left it as a monument to her children, she might well suppose, if her attention was called to the matter, that proper means of executing her purpose could be provided, through the medium of the courts, if in any matter of detail her provision therefor was insufficient. The charity intended by the testatrix was clearly specified. If the general object of the bequest is pointed out, or if the testator has fixed the means of doing so, by the appointment of trustees with the power of selection vested in them, then the gift must be treated as sufficiently definite for judicial cognizance, and will be carried into effect. *White* v. *Ditson*, 140 Mass. 357, 4 N. E. Rep. 606.

The use of the words, "it is strictly for private charities," in describing the fund, is relied on as furnishing an argument that the donation of the testatrix is itself a private charity. A gift is charitable where a fund is to be permanently maintained, and its income devoted to the relief of the poor and unfortunate, although its distribution is private and to private persons. What the testatrix contemplated was that the mode of administering the charity would be private, and that individuals would receive the benefit of it at the hands of those who administered it, rather than by any distribution of it in a more public manner. The mode in which, as it appears from the evidence, she had in her lifetime distributed the sums given by herself in charity, was to individuals. She always gave directly herself, held this to be the best way, and would never give to public societies. Those whom she had aided, to whom the allusion is made in the will, are found to have been persons formerly connected with her family, and one person whom she never personally knew, but whose condition of misfortune had for some reason especially interested her. Her intention is manifested to devote the income of this fund to the general relief of the poor by almsgiving to the needy, individually, through the agency of those who administer it. Each individual immediately receiving assistance may be private, and

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the charity may be distributed in private, and by private hand. Such a charity is public and general in its scope and purpose, and becomes definite and private only after the individual objects have been selected. *Saltonstall* v. *Sanders*, 11 Allen, 446. In the general and indefinite character of those who may become beneficiaries of the fund created by the testatrix, this gift is readily distinguishable from that considered in *Kent* v. *Durham*, 142 Mass. 216, where it was sought to establish as a public charity a gift intended solely for the benefit of the children of the testator and their descendants. In *Saltonstall* v. *Sanders*, *ubi supra*, where the gift was "in aid of objects and purposes of benevolence or charity, public or private," it was held that the words "public or private," must be taken in their natural meaning, and according to the construction given to them in a great majority of similar cases to indicate the mode of distribution only.

The argument for the heirs-at-law and next of kin, on this point, relies much on the case of *Ommaney* v. *Butcher*, Turn. & R. 260, where a testator after making numerous legacies, added, "In case there is any money remaining, I should wish it to be given in private charity," and it was held that this last bequest was too indefinite to be carried out. This case was carefully examined, compared with previous and subsequent decisions of the English courts, and its authority denied, after a full discussion, which it is needless here to repeat, in *Saltonstall* v. *Sanders*, *ubi supra*. There can be no difficulty, by the ordinary procedure and methods of a court of chancery in supervising the execution of such a charity, in compelling when deemed necessary, the rendering of proper accounts, and in providing that those who administer the income of the fund shall devote it in private charity, for the relief of the poor and unfortunate.

The result, therefore, is that the fund created by the fourteenth clause of the will is to be held by the trustees named, and that the income thereof, is to be paid to the sisters, to be applied to the relief and comfort

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of the poor and unfortunate, including those aided theretofore by themselves and the testatrix, in private charities, and as their judgment shall dictate, and that the income will be received by them upon this trust.

Instructions accordingly.

As to charitable trusts in general, see Hunt v. Fowler, 6 Am. Prob. Rep. 444, and the monographic note and cross-references; Dascomb v. Morton, 6 Am. Prob. Rep. 248; and Marston *et al* Petitioners, 6 Am. Prob. Rep. 229, and the cross-references.

BORN *vs.* HORSTMANN.

(80 California, 452.)

CONDITIONS.—PUBLIC POLICY.—SEPARATION FROM HUSBAND.

A bequest to a married woman in the event of her becoming a widow, or otherwise becoming "lawfully separated" from her husband, being at most only an inducement to the wife to assert her legal right to a divorce, cannot be said to be against public policy.

APPEAL from a judgment and order of the Superior Court of the City and County of San Francisco. The opinion discloses the facts.

Charles A. Sumner and *M. T. Moses*, for appellants.

E. J. Linforth and *Henry N. Clement*, for respondent, Elizabeth Zimmer.

WORKS, J. One Margaretha Faulhaber died the owner of certain real estate, and left surviving her four daughters and one son; some, if not all, of whom had children, who still survive. The deceased left a will, by which she conveyed her property to one Peter Schenkel and the defendant Horstmann, to be held and disposed of as follows, after the payment of certain speci-

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fic bequests: "4. To quarter-yearly equally distribute and pay unto my hereinafter named son and four daughters, during the term of their natural lives, the net income of the remainder of my said estate, in their own right, share and share alike, viz., Frank Faulhaber; Magdalena Ellen, now the wife of Henry Lux; Caroline, now the wife of Charles Born; Elizabeth, now the wife of George W. Zimmer; and Mary, now the wife of Christian Scheiffler. "5. And in the event of the death of any of my said children, then to equally distribute, transfer, and convey the net one-fifth part of the remainder of my said estate unto the surviving lawful issue of such deceased child, in her, his, or their own right, share and share alike. "6. In the event of the death of any of my said children without having any lawful issue surviving the same, then to quarter-yearly equally distribute and pay such proportion of the said income as the deceased should be entitled to receive (if living) by this will unto such of my said children as may survive the deceased in their own right, share and share alike. "7. And in the event of any of my said daughters becoming a widow, *or otherwise becoming lawfully separated from her husband*, then to distribute, transfer, and convey unto such of my said daughters the net one-fifth part of the remainder of my said estate, in her own right, and in lieu of the further distribution and payment to her of any of the said income." Horstmann alone accepted the trust, the will was probated, the estate settled, the specific bequests paid, and the residue of the property distributed to Horstmann, to be held in trust by him as provided in the will.

The plaintiff in this action was one of the daughters named in the will. After the property was distributed as above stated she was divorced from her husband, and the trustee, acting under the seventh clause of the will, conveyed to her the undivided one-fifth of the real estate, and this action was brought by her for a partition of the property, and to have her interest therein set off to her. The other daughters, who were made defendants, answered, among other things, as follows:

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"That it was the intention of the said testratrix in and by the said will to give to each of them, her said daughters, in fee-simple, an undivided one-fifth interest in the said land, upon condition that they should respectively separate or become divorced from their respective husbands, and that said condition was annexed to the said devise by said testatrix with intent to incite and encourage her said daughters to live separate or be divorced from their said respective husbands; that the said condition, and the provisions of the said will in that behalf are contrary to good morals and the policy of the law, and the trusts for that purpose created are null and void." We are pleased to see that this allegation is not verified by the daughters but by their attorney, who cannot be charged with having reflected upon a dead mother in order to obtain possession of her property. The children of the son, who was deceased, and of the daughters, were also made defendants, and answered by guardian *ad litem*. The court below found the facts substantially as above stated, and also, "that it was the intention of said testratrix, in and by said will, to give to each of her said daughters in fee-simple an undivided one-fifth interest in the said real estate, upon condition that they should respectively separate or become divorced from their respective husbands, and that said condition was annexed to said devise by said testatrix with intent to incite and encourage her said daughters to live apart or be divorced from their respective husbands." As conclusions of law, the court below found that the above-named conditions are void; that the daughters all took the property absolutely freed from said condition, and that their children had no interest in the property; and rendered judgment of partition accordingly.

The children of the daughters, by their guardian *ad litem* appeal.

Both the appellants and the respondent now agree in contending that the condition in the will which affected their rights to the property in case of a separation from their husbands otherwise than by death was void;

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but they do not agree as to the effect of the provision being so held. The appellants contend that, construing that clause to be invalid, the daughters were not entitled to the property until the death of their husbands; while the respondent and the other daughters contend that the clause referred to being void, they were, as held by the court below, entitled to the property at once. We regret that we are unable to agree with counsel on either side, or with the court below as to the proper construction of this clause in the will. In our judgment there is nothing in the conditions referred to that can be held to be against public policy. There are cases holding that a condition in a will which holds out to the legatee an inducement to live separate and apart from her husband is void as against public policy. Thus in *Brown* v. *Peck*, 1 Eden, 140, the will provided that the legatee should be paid two pounds per month if she lived with her husband, but if she lived from him, and with her mother, she should be paid five pounds a month. In *Wren* v. *Bradley*, 2 De Gex & S. 49 the bequest was "to my daughter, Ann Jefferies Wren, the wife of Abraham Wren, in case she shall be living apart from her said husband, the said Abraham Wren, and shall continue so to do during the lifetime of my said wife, an annuity of £30, by equal quarterly payments, the first of such payments to be made at the expiration of three calendar months next after my decease. And I do hereby further direct, that if at any time the said Ann Jefferies Wren shall cohabit with the said Abraham Wren, the said annuity hereinbefore given to her shall, during the time she shall so cohabit, absolutely cease and determine." In *Conrad* v. *Long*, 33 Mich. 79, the clause of the will was as follows: "To my brother, Frederick S. Conrad, I give and bequeath the one-half so remaining, and the other half I give and bequeath to my sister, Elizabeth Long, upon this condition: if at any time subsequent she should conclude not to live with her present husband, Henry Long, as his wife. But if she continue so to live as the wife of the said Henry Long until her death, then in that case I give and bequeath all my

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property, real and personal, remaining after the burial of my mother aforesaid, to my aforesaid brother, Frederick S. Conrad. In all of these cases the conditions quoted were very properly held to have been void. The reason is apparent. They held out a direct inducement for the legatees to live separate and apart from their husbands. The result may have been to bring about the separation and violation of their marital duties and obligations without any just cause, and in an unlawful manner. This is not so in the case at bar. The condition under consideration could not be complied with except by a legal separation, and for causes found by a court of justice to be sufficient. This being so, there was nothing unlawful in the condition. It is true, it may be said that it would have a tendency to induce the wife to assert her legal right to a divorce and separation, and that but for such inducement such right might have been waived, but it can hardly be said that it is against public policy to attach to a legacy such a condition as will tend to induce a legatee to do a lawful act in a lawful way.

The precise question presented here has been before the supreme court of Vermont, in which the will provided that the legatee should have the income of the estate, and such further sums as her wants might demand, so long as she remained the wife of I. A. Thayer; but if she was "left a widow, *or for any cause* should cease to be the wife of said Thayer," the whole estate should be given to her. In that case the court said: "The ground upon which it is claimed that the provision of the will violates public policy is, that it furnishes an inducement to the wife to become the widow of her husband, or to separate herself from him in such a manner that she would cease to be his wife. The appellants, to sustain this claim, rely upon the rule as stated in 2 Redf. Wills, 293; 1 Story, Eq. Jur. 291, and the case of *Conrad* v. *Long*, 33 Mich. 78. The cases cited in support of the rule laid down in Redfield and Story, it will be found on examination, do not sustain the rule as here sought to be applied. They are

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generally cases in which an inducement was directly held out to encourage a voluntary separation of husband and wife, and where the intent to encourage such a separation could be found in the language employed in making the bequest. They are none of them so similar in their facts to the case at bar that they can be considered authorities in it. "The first object to be ascertained, if possible, is what the intention of the testatrix was; and we find no difficulty in reaching the conclusion that it was to have her estate disposed of just as it has been by the probate court. It was a wise and prudent provision to make for her daughter. While she should remain a wife, her husband would be under obligation to support her, and hence the income, only, was absolutely left her during the continuance of that relation; but when she should cease to be a wife, and so become dependent upon her own resources, it was just and wise to provide that she should have the entire estate." (*Thayer* v. *Spear*, 58 Vt. 327, 2 Atl. Rep. 161.) We fully concur in this view of the law. Not only may there be a good and sufficient reason, as stated in the opinion cited, for providing that the legatee shall not have the bulk of the property until she is deprived of the support of a husband, but there may be the best of reasons for placing the same in such a condition that she cannot be improperly induced by a worthless or profligate husband to squander it, while she continues to be his wife, and it may be, under his influence and control. We think such a condition in a will is not only valid, but that under certain circumstances, it may be just and commendable. For these reasons the judgment of partition in favor of the plaintiff was proper, but so much thereof as authorized the balance of the property to be set off to the daughters who were still married was erroneous. It was error, also, to hold and adjudge that the children of the daughters last mentioned had no interest in the property. They are entitled to have the property remain undisposed of until the conditions of the will are complied with, and to inherit the same upon the death of their mother before the condition shall happen.

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Judgment and order reversed and cause remanded for further proceedings in accordance with this opinion.

FOX, J., and PATTERSON, J., concurred.

See, further as to conditions respecting separation from husband, Thayer v. Spear, 4 Am. Prob. Rep. 451, and the note on "Conditions in a Will void as against Public Policy."

SCHWAB *vs.* PIERRO.

(43 Minnesota, 520.)

LEGACY.—SERVICES IN VIEW OF LEGACY.

S. worked for P., who was his uncle, without any express agreement for compensation, but with the mutual understanding of both that he should be compensated by adequate provisions in the will of M. The latter died without making such provision. *Held*, that S. might recover the value of such services as upon a *quantum meruit*.

APPEAL from an order of the District Court of Hennepin County.

Penney & Rogers, for appellant

George C. Ripley, *C. E. Brennan* and *S. A. Booth*, for respondent.

VANDERBURGH, J. The plaintiff seeks to enforce a claim against the estate of Michael Pierro for services rendered him in his lifetime. The defence relied on is that the plaintiff was a nephew of the deceased, and was a member of his family, while such services were rendered, and that they were so rendered without any promise or agreement, express or implied, on the part of the deceased, to pay for the same, and without any expectation on plaintiff's part to receive any compensation therefor. The deceased was a bachelor, and owned a hotel in Minneapolis. His only relations were

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plaintiff's mother, who was his sister, the plaintiff, and the defendant, executor and principal legatee, who was his cousin. About 1877, plaintiff, then a boy about 13 or 14 years of age, came with his mother, a widow, to plaintiff's house, which was then rented and managed by one Brandenburgh, as a hotel and saloon, and she went to work there for wages, and he "did chores for Brandenburgh," and the deceased boarded at the same place. This state of things continued for several years, till the spring of 1882, when the plaintiff, then about 18 years of age, left, and went to work for wages at Chaska. In May of the same year Brandenburgh surrendered possession of the hotel to the deceased, who thereupon became proprietor, and plaintiff was notified by his mother, who remained there, to return, because he was needed to take charge of the business of his uncle. He thereupon came back, and for two years and upwards took charge of the hotel and saloon, bought the supplies, paid the bills, tended bar, and had the general care and management of the business. The deceased, however, was about the premises, and received the avails and profits of the business. At the expiration of two years and three months the plaintiff succeeded to the business, having bought the same of his uncle, but not the hotel property. In the meantime both plaintiff and his mother had continued to work for and assist the deceased in carrying on the hotel business. After that he paid rent to the deceased for the use of the hotel. What compensation his mother received during this time does not appear. It is clear enough from the evidence that the plaintiff did not understand that he was to receive no compensation for his services other than as a member of the family of the deceased, or that his board and living expenses were adequate compensation, for it is admitted that his services were reasonably worth $50 per month. Prior to the time he left for Chaska, he was living with his mother at Brandenburgh's hotel, and, though the deceased boarded there, the presumption is that he was supported by his mother; and, though there is evidence

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tending to show that both before and after his return from Chaska his uncle had made some expenditures for him for necessaries, there is hardly enough to show that he had assumed the responsibility of plaintiff's support, or that in consideration thereof the latter was rendering the services in question. He had never claimed plaintiff's wages before, and when the latter was sent for to take charge of the hotel it could hardly be presumed that either party expected or understood that he was not to receive adequate compensation of some sort. And, though there was no express agreement or definite understanding between them, it is rendered indisputably clear from the evidence what the apparent intention and purpose of the deceased was, as expressed in the presence of the plaintiff, and to his friends, from time to time, and what was plaintiff's expectation and understanding in the premises,—and that was that he was eventually to have the hotel property as the devisee of his uncle. There is hardly room for a difference of opinion that such was the mutual understanding of the parties when the services were rendered. And the repeated declarations of the deceased, his general course of conduct towards the plaintiff, and the situation and relations of the parties, were sufficient to justify the trust and confidence reposed by the plaintiff in the assurances of the deceased that he was to be his sole heir; and this fact affords a sufficient explanation of his conduct in not presenting any claim for his services, or demanding an accounting and settlement with his uncle before he died, for no claim for compensation was to be made in his lifetime.

The plaintiff could not, under the statute, give testimoney in reference to what may have passed directly between him and the deceased on the subject; but while there was no express agreement proven, there was ample evidence of the mutual understanding of the parties in reference to the intentions of the deceased, and the character of the compensation which the plaintiff was induced to believe he would finally

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receive. The plaintiff was entitled to be paid for his services unless they were to be performed gratuitously; but the evidence, we think, satisfactorily shows the nature of the compensation contemplated by the parties, and rebuts any presumption which might arise from the relations of the parties that they were not to be rewarded. It is not enough that the services should be rendered merely in the hope or expectation of a legacy, and relying solely on the generosity of the testor. But the rule appears to be well established that where it is mutually understood that services are not to be rendered gratuitously, but to be compensated for in a particular way, then the law will permit a recovery of the reasonable value of such services, if the particular compensation contemplated is not made. *Martin* v. *Wright*, 13 *Wend.* 460; *McRae* v. *McRae*, 3 Bradf. Sur. 199, 204; *Patterson* v. *Patterson*, 13 John, 379; *Quackenbush* v. *Ehle*, 5 Barb, 469; *Robinson* v. *Raynor*, 28 N. Y. 494. It was error to allow evidence to be introduced of the value of the estate, as this might improperly influence the estimate of the damages. *Erben* v. *Lorillard*, 19 N. Y. 299. But it was without prejudice in this case, for the reason that the value of plaintiff's serices was admitted. The case rests solely upon the evidence introduced by the plaintiff. The defendant contends that it ought to have been submitted to the jury for them to pass upon, and that the court erred in directing a verdict. But the plaintiff seems to have made a strong case. It is supported by the testimony of numerous witnesses showing the intention of the testator, as repeatedly expressed by him, and the mutual understanding of the parties, that the plaintiff was to have the property. There was no conflict, and there can hardly be said to be any reasonable doubt, as to the inferences to be drawn from the testimony by which we think the facts as above stated are satisfactorily proved. *Robinson* v. *Raynor*, 28 N. Y. 494, 499.

Order affirmed.

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MAYNARD *vs.* CLEAVES.

(149 Massachusetts, 307.)

ABSOLUTE AND CONDITIONAL DEVISE. — LIABILITY OF PROPERTY TO CREDITORS OF DEVISEE.

To confer such an interest in property as cannot be reached by creditors of the devisee, the language of the testator must be such as to clearly import an intention so to do.

IN the Supreme Judicial Court of Suffolk County. The facts appear in the opinion.

Z. S. Arnold, for plaintiff.

H. E. Ware, for executor.

MORTON, C. J. By his will Daniel Cleaves gives to his "wife, Lucy Ann Cleaves, for and during her life, the use, income, and benefit of all my estate, both personal and real, and wherever the same may be found or located at the time of my decease; to be for her comfort and support, and I trust that she will make suitable provisions for the support of our daughter, Mary Theresa Cleaves, if unmarried. It is my desire that the house and grounds, No. 567 Dudley street, in said Boston, now occupied by me, shall be kept as a home for them." The question in this case is, whether the interest of Lucy Ann Cleaves under this will can be reached in equity by her creditors, and applied in payment of the debts due them by her. It is settled in this Commonwealth that a testator who makes a gift of income to a beneficiary may provide that it shall not be alienable in advance by him, or be subject to be taken by his creditors. But in order to give such a qualified estate, instead of an absolute one, the language of the testator must be such as clearly to import an intention to do so. *B'way Nat'l Bank* v. *Adams*, 133 Mass. 170; *Foster* v. *Foster*, Id. 79; *Sears* v. *Choate*, 146 Mass. 395, 15 N. E. Rep. 786. In the case at bar the testator makes an absolute gift of the whole income

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of his estate to his widow for her life. The words, "to be for her comfort and support," at most, express the motive and purpose of the gift, but cannot be held to make the gift conditional. They have little, if any, more significance than the words, "to be for her benefit and enjoyment," and are not sufficient to cut down the clearly expressed absolute gift to a qualified or conditional one. She has the right, since the death of the daughter, to use the income in any manner she sees fit, and the executor has no right to withhold any part of it on the ground that she does not need the whole for her comfort and support. She has an absolute estate in the income, which she can alienate, and which can be reached by her creditors. This case is clearly distinguishable from the case of *Baker* v. *Brown*, 146 Mass. 369, 15 N. E. Rep. 783. There the gift was not of the income of a fund, or of any fixed or ascertainable sum of money. The will gave an estate to the daughters of the testatrix, "subject to the condition that they should support their father during his life." It was decided that, under the circumstances of that case, the intention of the testatrix was that the daughters should furnish the father a reasonable support in their own household or elsewhere, the mode of furnishing his support being in their discretion, and that the interest of the father was such that it could not be reached by his creditors, without imposing upon the daughters duties and obligations different from and greater than those imposed by the will.

Decree for plaintiff.

See Smith v. Towers, 6 Am. Prob. Rep. 589, and the cross-references.

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HALLIDAY *vs.* STICKLER.

(78 Iowa, 388.)

REPUGNANCY. — GENERAL DEVISE. — GIFT OVER OF WHAT REMAINS.

A devise of real estate to testatrix's husband in general terms without words of limitation with a gift over to his children of "whatever of the same should be left at his decease," confers an absolute estate upon the first devisee; and the gift over is void for repugnance.

APPEAL from an order of the District Court of Appanoose County. The facts appear in the opinion.

Tannehill, Vermilion & Haynes, for appellants.

L. C. Mechem and *T. M. Fee*, for appellee.

ROTHROCK, J. It appears from the averments of the petition that on the 2nd day of November, 1870, one Priscilla Beer, the wife of George S. Beer, made and executed her last will and testament. The following is a copy of said instrument, so far as material to the questions involved in this case: "(1) I give and bequeath unto my two sons, William A. Beer and Joseph G. Beer, one span of horses each, and one bed and bedding each, and also one cow to each, to be delivered to them as soon as convenient after my decease. (2) I further give and bequeath unto my two daughters, Sarah Frances Beer and Nancy Adora Beer, a bed and bedding to each, and a cow apiece to each, as soon as convenient after my decease. (3) I give and bequeath to my granddaughter, Josephine Shields, the sum of two hundred and fifty dollars at the death of my husband, George S. Beer. (4) I give, devise and bequeath unto my beloved husband, George S. Beer, all the real and residue of both my real and personal estate, of every name and nature whatsoever, and whatever of the same should be left at his decease I direct should be equally divided between the children of the said George S. Beer and their heirs and assigns forever." After the death of

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Priscilla Beer, plaintiff's intestate, George S. Beer, sold and conveyed all of the land devised to him by said will to his two sons, W. A. and Joseph G. Beer. Afterwards said Joseph G. Beer reconveyed to said intestate all the interest he had in said land.

By this reconveyance said intestate again became the owner of an undivided half of the devised lands, to the same extent at least as he formerly held the same under the will. The demurrer to the petition was upon the following grounds: "(1) The petition and amendments thereto, and exhibit of will attached, show on their face that the estate of George S. Beer has no interest in the land sought to be sold for the payments of the debts of said estate. (2) The petition and will attached show that George S. Beer took only a life-estate in the land in question under the will, and that said land is not subject to the payment of his debts." It is earnestly contended by counsel for appellants that under a proper construction of the will George S. Beer took a life-estate in the land devised, and that at his death it descended to his children, and is not liable for the payment of his debts. In our opinion, a fair consideration of the instrument in all its parts will not authorize the construction contended for by counsel. The fourth clause of the will is an absolute devise, without limitation upon the devisee. It is a devise of the real estate in general terms. It neither by words nor by any fair implication limits the devise to a life-estate. On the contrary, and in addition to the general devise, without words of limitation by plain implication, it authorizes the devisee to sell and convey the land. There is no devise over, unless some of said estate should be left at the death of the devisee. If a life-estate was intended to be devised, the whole of the real estate would be left at the decease of George S. Beer. He could not, by sale and conveyance of the land enlarge his estate or right thereto. This court has repeatedly held that, if the first devisee has power by the terms of the will to dispose of the property, he must be considered the absolute owner, and any limitation over

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is void for repugnance. *Rona* v. *Meier*, 47 Iowa, 607; *Williams* v. *Allison*, 33 Iowa, 278; *Alden* v. *Johnson*, 63 Iowa, 124, 18 N. W. Rep. 696; *In re Burbank*, 69 Iowa, 378, 28 N. W. 648. And see also, *Flinn* v. *Davis*, 18 Ala. 132; *Jackson* v. *Bull*, 10 Johns. 18; *Ide* v *Ide*, 5 Mass. 500; *Helmer* v. *Shoemaker*, 22 Wend. 138. In the case at bar there is not even an absolute limitation over. It is merely a provision that whatever may be left at the decease of the devisee shall be divided between the children. Counsel for appellants cite to us a number of cases they claim are authority for holding that the devise under consideration is a life-estate. They urge special attention to the case of *Benkert* v. *Jacoby*, 36 Iowa, 274. It appears to us that the provisions of the will construed in that case are so unlike the will in the case at bar as to be no aid in determining the rights of these parties. The law of the cited case is in harmony with the rule of construction above announced. We have carefully examined the other cited cases, and find no reason from such examination to doubt the conclusion that the court below rightfully overruled the demurrer.

Affirmed.

See Read v. Watkins, 3 Am. Prob. Rep. 483, and Bliven v. Seymour, 2 Am. Prob. Rep. 447. As to who is entitled to possession where there is a bequest of personal property for life with remainder over, see Brannock v. Stocker, 2 Am. Prob. Rep. 333, and the note.

MATTISON *vs.* FARNHAM.

(44 Minnesota, 95.)

EXECUTORS. — PERSONAL LIABILITY. — DECEASED PARTNER.

Where the executor of a deceased partner, in compliance with directions in the testator's will, continues the partnership business with the surviving partner, with the testator's assets, and for the benefit of

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the estate, he does not thereby become personally liable for debts contracted by the firm during the life of the deceased partner; nor does the fact of his so continuing the business give the surviving partner any implied authority to bind him for such debts.

APPEAL from an order of the District Court of Hennepin County.

J. M. Shaw, *W. A. Lancester* and *H. M. Boutelle*, for appellant.

Miller, *Young* & *Akers*, for respondents.

MITCHELL, J. Conceding for the sake of argument, that there was evidence tending to prove that the executors of James A. Lovejoy, the deceased member of the partnership of "Farnham & Lovejoy," had so acted with reference to the continuance of the partnership business that they became partners therein with S. W. Farnham, the surviving member of the firm; and conceding the law to be that they thereby incurred the personal and unlimited liability of partners for all debts contracted after the death of their testator, still plaintiff failed to make out a cause of action against them, and the action was properly dismissed. The notes sued on were executed by S. W. Farnham, the surviving partner, in the name of the firm, in renewal of notes given by Farnham & Lovejoy in the lifetime of Lovejoy, or at least for an indebtedness of the firm contracted in his lifetime; and there is not a particle of evidence that these notes were executed by Farnham by the authority or even with the knowledge of the executors, or that in entering the firm as partners, if they ever did, they assumed the existing liabilities of the partnership. The law probably is that an executor of a deceased partner, who engages in and continues the partnership business, with the testator's assets, with the surviving partner, will be liable personally for debts contracted in the business during such continuance of it, although he does it as executor, and in compliance with directions in the testator's will, for the

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benefit of the estate. This rule is so severe that it has been changed in some states by statute. It grows out of the fact that the law insists on a personal and unlimited liability as the essential characteristic of a partner, and, from the supposed necessities of the case, it takes the executor as the substitute of the deceased. But it was never heard that an executor, in thus assuming the relation and responsibilities of a partner by continuing the partnership business of his testator, assumed or became personally liable for debts contracted by the firm during the life of the decedent. The manifest injustice and unreasonableness of such a proposition is its most complete refutation. Where an executor thus engages in carrying on the business, it is usually spoken of as a continuance of the partnership; but it is incorrect to so term it. It is necessarily the creation of a new partnership, in which the executor takes the place of the deceased partner, and it is elementary law that a person becoming a member of an existing firm, or forming a partnership with another in the latters existing business, does not thereby become liable for the debts already incurred, nor does the new firm become liable for them. An agreement, express or implied, is necessary to create such liability, not only between the creditors and the new firm, but also between the partners. The presumption is against the assumption of such liability, and the burden to prove it is upon him who asserts it; and if such is the presumption in the case of one entering a firm for his own personal profit, it should obtain with increased force in the case of an executor who becomes a member solely for the benefit of the estate of his testator. It is no answer to say, as does the plaintiff, that, defendants having become partners with Farnham, "the act of any one of them within the scope of the partnership business was the act of all;" for giving the obligations of the firm for other than partnership debts was not within the scope of the partnership business. Neither is it important that in his will Lovejoy gave his executors authority to join with Farnham in the execution

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of notes or other contracts for renewing and continuing any firm indebtedness existing at the time of his decease. They certainly were not bound to do so, and the fact that they might have seen fit to unite with him in continuing the business gave him no implied authority to bind them for existing indebtedness of the old firm.

Order affirmed.

As to the liability and power of personal representative carrying on testator's business, see, Brasfield v. French, 2 Am. Prob. Rep. 607, and monographic note; also Bennett v. Rhodes, 3 Am. Prob. Rep. 143.

PEASLEE *vs.* FLETCHER'S ESTATE.

(60 Vermont, 188.)

SUBJECT OF BEQUEST. — WORDS OF DESCRIPTION. — "GOODS AND CHATTELS."—RESTRICTIVE EFFECT OF A RESIDUARY CLAUSE.

Except in residuary clauses, general words, such as "goods and chattels," when following after and coupled with words of a limited signification, such as "my household furniture," are restricted in meaning to things *ejusdem generis*, and would not include promissory notes nor money, unless partial intestacy would result from such construction by reason of the will containing no bequest of the residue of testator's estate.

APPEAL from a judgment of Chittenden County Courts. The facts appear in the opinion.

Hard & Cushing, for plaintiff.

W. L. Burnap and *Geo. W. Wales*, for the defendant.

TYLER, J. The only question presented by the bill of exceptions in this case arises in construing the following clause in the will of Mary M. Fletcher, late of the city of Burlington, deceased, or rather, that part of the

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clause which relates to the bequest of the personal estate of the testatrix:

"I give to my uncle, George L. Peaslee, of Auburn, Maine, my home place on Prospect Street, in said Burlington, with my household furniture, and all my personal goods and chattels on said premises at the time of my decease."

The plaintiff, who is the devisee mentioned in said clause, claims that the words "all my personal goods and chattels on said premises at the time of my decease" are operative to pass to him seven promissory notes of $1,000 each, which the testatrix held against one Manwell, and $1,100.18 in money, which were in the house or "home place" of the testatrix when she died.

In giving construction to this clause, we must consider all the words contained in it, and also its relation to the other portions of the will, in order to ascertain, if possible, the testatrix's real intention.

It appears by the bill of exceptions that she was accustomed to keep her promissory notes, and other like securities, in her house, and that, at the time of the execution of this will, which was during an illness from which she did not expect to recover, she had in her house besides the notes in controversy, other promissory notes amounting to about $80,000; also that she was in the habit of having certain United States bonds brought from the banks in the city, where she usually kept them, to her house, where they would remain during the day, while she cut off the coupons.

It is true that the word "chattels" has a broad enough signification to include promissory notes and bank-bills, and, in many locations in a written instrument, it would be construed to include them; but in this case, if it had been the intention of the testatrix to bequeath to the plaintiff so large an amount of money and personal securities as was often in her house, and liable to be there at her decease, it is hardly reasonable to suppose that she would have employed so general and inapt a term as "goods and chattels" for that purpose, when she obviously might have bequeathed

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them in unmistakable language. Had she intended to give her uncle all such promissory notes and money on hand, or any part thereof, it is fairly presumable that she would have said so plainly.

Again, we must consider all the language of the clause in question,—the words "my household furniture" as well as "my personal goods and chattels,"—and determine, if we can, what relation the respective words bear to each other; whether or not the latter are restricted in their meaning by the former. The authorities on this point are numerous and somewhat conflicting, but we find that the general current of them, both in England and in this country, is that, except in residuary clauses, general words, such as "goods and chattels," when following after and coupled with words of a limited signification, are restricted to the same class as the former. 2 Will Ex. 1015, 1017, and cases cited. Thus, where the testator bequeathed to his niece all his goods, chattels, household stuff, furniture, and other things which should be in his house at A., it was decreed that cash found at the testator's house did not pass; for by the words "other things" should be intended things of like nature and species with those before specified. *Trafford* v. *Berrige*, 1 Eq. Cas. Abr. 201. Jarman in his work on Wills, cites the case of *Lamphier* v. *Despard*, 2 Dr. & War. 59, where a testator, after devising certain real estate to his wife, bequeathed to her all his household furniture, plate, house linen, and "all other chattel property that he might die seized or possessed of," and, after various legacies, he appointed A. his executor and residuary legatee. Sir EDWARD SUGDEN held that "all other chattel property" meant all *ejusdem generis*, relying partly on the subsequent residuary gift. He thought, however, that the words would clearly not pass money, so that the clause could not be a general bequest of the entire personal estate.

In *Rawlings* v. *Jennings*, 13 Ves. Jr. 36, the bequest was "unto my wife, Alice Jennings, two hundred pounds per year, being part of the moneys I now have

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in bank security, entirely for her own use and disposal, together with all my household furniture and effects, of what nature or kind soever, that I may be possessed of at the time of my decease." The Master of the Rolls said: "The second question arises upon the widow's claim of the whole residue of the personal estate as passing to her under the general word 'effects.' That claim cannot be sustained. Part of his property being particularly given to her afterwards, the word 'effects' must receive a more limited interpretation, and must be confined to articles *ejusdem generis*, with those specified in the preceding part of the sentence, *viz.*, household furniture."

In *Dole* v. *Johnson*, 3 Allen, 364, the testator bequeathed to his widow all his household furniture, wearing apparel, and all the rest and residue of his personal property. HOAR, J., in construing this clause, said: "We think the meaning of the whole will is made most consistent by restricting the word 'property' to chattels *ejusdem generis* with those enumerated. By this construction the widow will take absolutely the household furniture, wearing apparel, and other chattels in and about the house of the testator adapted to personal use and convenience, such as books, pictures, provisions, watches, plate, carriages, domestic animals, and the like, but not including money, stocks, securities, or evidences of debt."

In *Johnson* v. *Goss*, 128 Mass. 433, where the bequest was as follows: "I give to my wife all my personal property, my household effects, horses, carriages, life insurance, etc.,"—the court held that this general term, "all my personal property," was not used in its ordinary sense; that the language did not purport to bequeath the residuum of the testator's property, and, construing it in connection with the words immediately following, "my household effects," etc., that the testator's purpose was to describe property of the same kind, and that he used the adjective "personal" as descriptive of chattels of personal use and convenience, not including stocks, securities, or other productive property.

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In *Benton* v. *Benton*, 63 N. H. 289, the bequest was as follows: "I give my wife every article of household furniture, books, etc., and every other article of personal property in and about said homestead, or wherever found, belonging to my estate;" and under it the widow and the residuary legatees both claimed the bank shares, notes, and cash on hand. The court held that the words "every other article of personal property" were limited to the same class of things as those enumerated, and did not include the bank stock, notes, and cash claimed by the widow.

Were there no residuary clause in this will, the words in question might and probably would be construed to pass this property to the plaintiff, for the reason that courts are always disposed to give the broadest meaning practicable to the words of a bequest when it is necessary to do so in order to prevent intestacy. The same is true when words of a general signification are found in the residuary clause itself, and for the same reason. Jarman, in commenting upon cases which indicate the disposition of judges of the present day to adhere to the rule which gives to words of a comprehensive import their full extent of operation, remarks, however, "that in all the preceding cases there was no other bequest capable of operating on the general residue of the testator's personal estate if the clause in question did not. Where there is such a bequest, it supplies an argument of no inconsiderable weight in favor of the restricted construction, which is then recommended by the anxiety always felt to give to a will such a construction as will render every part of it sensible, consistent, and effective."

Many of the cases cited by the plaintiff's counsel are upon the construction of residuary clauses in wills. Such is the case of *Parker* v. *Marchant*, 20 Eng. Ch. 290, where it was held that the words "goods, chattels, and effects," after an enumeration of various articles, carried the residue of the testator's property. The Vice-Chancellor, in considering the point whether, by these words, the testator had disposed of the general

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residue of his personal estate, or had so far died intestate, said: "This turns upon the meaning to be attributed to the words 'goods, chattels, and effects,' having regard to the position in which they are found in the will, and having regard, also, to the whole contents of the will." Such, also, is the case of *Brown* v. *Cogswell*, 5 Allen, 556.

The will under consideration contains a residuary clause. After the bequest to her uncle, the testatrix gave all the residue of her estate, except two small legacies, to the Mary Fletcher Hospital.

Upon these well-recognized rules of construction, we hold that the words, "goods and chattels," in the connection in which they are found, should be construed as having only a restricted and limited signification, and as not including said Manwell notes and cash on hand; that they are further restricted in their meaning by the word "personal," which indicates, when considered in its relations to the words "household furniture," that the testatrix intended by the words in question to bequeath only other articles of the same kind, belonging to the house, "savoring of the locality." adapted and pertaining to her personal use. This view is sustained by the fact that no definite amount of money and notes was kept at the house. It often varied with varying circumstances, and the notes and money were carried away and brought back as the testatrix had occasion to go from or return to her home, and were being removed when she died.

To give these words the broad meaning claimed for them by the plaintiff would be to invest them with power by which they might have defeated what seems to have been the main purpose of the will, namely, the endowment of said hospital; for at times nearly the entire personal estate of the testatrix was in her house.

In the view that we have taken of this case, the testimony of the plaintiff received by the court below was wholly immaterial. The result is the judgment of that court is affirmed, and certified to the Probate Court.

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Words of description general and specific.—As stated in the principal case, the decisions upon this subject have not always been uniform. In Church v. Mundy, 15 Ves. 396, *per* Lord ELDON, it was said: "A court of justice is not, by conjecture, to take out of the effect of general words property which those words are always considered as comprehending." In Lock v. Noyes, 9 N. H. 430, hold that choses in action will pass under a testamentary disposition similar to that in the principal case; the note in that case, however, had been endorsed by the testatrix. And as a general rule, negotiable instruments payable to bearer, or if payable to order and endorsed are properly within the words goods and chattels. (Benton v. Benton, 63 N. H. 289; Webster v. Wiers, 51 Conn. 569; Sprigg v. Weems, 2 Har. & McH. 266; Cook v. Bosinger, 4 Mod. 156; 2 Williams, Ex. 1274; 1 Roper, Leg. c. 31, Secs. 1, 2. *Cf.* Parsons v. Winslow, 6 Mass. 174; Browne v. Cogswell, 5 Allen, 556.) It is certainly safest to adhere to the rule which gives to words of a comprehensive import their full extent of operation, "unless some very distinct ground can be collected from the context for considering them in a special or restricted sense." (1 Jarman, Wills, 760. *Acc.* Church v. Mundy, 15 Ves. 396; Parker v. Marchant, 1 Younge & C. Ch. 290; Browne v. Cogswell, 5 Allen, 556.) Such a ground of restriction is found in the fact that the will contains a residuary clause under which the things in controversy may more properly pass, (2 Jarman, Wills, 364), and the rule as thus modified in the principal case appears to be the proper solution of the difficulty.

In Penniman v. French, 17 Pick. 404, the words "indoor movables" were held to include only such things as were used about the house. In Bullard v. Goffe, 20 Pick. 252, the words "All the residue of my furniture and estate whatsoever," were restricted to personal property. But in Jackson v. Robinson, 1 Yeates, 101, "every kind of movables" was held to include bonds. Many cases on this subject are stated in Jarman on Wills, 754 *et seq.*

In re TRAYLOR'S ESTATE.

(81 California, 9.)

SUBJECT OF BEQUEST.—DESCRIPTION OF LAND.—UNCERTAINTY.

A direction to executors to purchase at a price left blank in the will, a tract of land at or near the residence of the devisees for their use as a cattle pasture, without any other sort of designation by which any particular piece or quantity of land could be determined, is void for uncertainty.

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APPEAL from a judgment of the Superior Court of the City and County of San Francisco.

Selden S. & George T. Wright, for appellants.

D. Wm. Douthitt, for respondent.

MCFARLAND, J. This is an appeal taken by Joseph and Margaret Wilson and Kitty Bell from a judgment of the court below construing the will of the deceased, and ordering a distribution of the residue of the estate to the heir-at-law. The only point made by appellants is that the court erred in holding void for vagueness and uncertainty the following clause of the will:

'I also require my said executors to purchase, at a price not exceeding $——, a tract of land at or near the residence of said Wilsons, at Santa Barbara, for a cattle pasture, the free and exclusive use of which the said Wilsons shall have during their lifetime, and the survivor of them, but which tract of land shall at the death of both of them vest in fee in their daughter, Kitty Bell."

We think that the judgment of the superior court was right. Counsel for appellants argue the case, mainly, as if the only question were, did the failure to state the amount to be expended render the devise void? But that is only half of the problem. If there had been any certainty in the description, or, indeed, any description at all of the land directed to be purchased, it may be that the will should have been construed as directing the purchase of the land described, no matter what it might cost. But when we go from the blank dollar-mark to look for a description of the land, we come upon another blank as empty as the first. There is no description, either by common name, or by metes and bounds, or by quantity, or by any other sort of designation, by which any particular piece of land can be indicated. The case is very different from the cases cited, where bequests for the education, or support, or maintenance, etc., of infants and others, with-

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out specifying the amounts to be used for such purposes, have been maintained. In such instances the amount necessary for the purpose, considering the station in life of the legatee and the condition of the estate, can readily be acertained with reasonable certainty. But in the case at bar there is no path that will lead the inquirer out of the labyrinth.

Judgment affirmed.

SHARPSTEIN, J., and THORNTON, J., concurred.

Hearing in Bank denied.

See further as to description of the thing devised, Sturgis v. Work, 7 Am. Prob. Rep., *supra*, 23, and the cross-references; and Peaslee v. Fletcher's Estate, 7 Am. Prob. Rep., *supra*, 217.

GIFFORD *vs.* O'CONNOR.

(117 New York, 275.)

EXECUTORS AND ADMINISTRATORS.—COLLECTION OF ASSETS.—DUE VIGILANCE.—RIGHTS OF CREDITORS.—SUPERSTITIOUS USES.

If there be reasonable ground for considering that the legal steps to be taken to collect assets by the executor would have been ineffectual, then his failure, acting in good faith, to take them does not render him liable as for a *devastavit*.

A delay in presenting a claim against the estate of a decedent of more than a year and a half after the probate of a will, and for six months after the expiration of an advertisement for claims against the estate, wholly unexplained, bars the creditor from holding the executor liable for moneys paid out by him in good faith in accordance with the provisions of the will, although for a superstitious use.

APPEAL from an order of the Supreme Court, General Term, Second Department. The opinion discloses the facts.

Ralph E. Prime, for appellant.

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T. G. Barry, for respondent.

PECKHAM, J. We think the General Term arrived at the correct conclusion in this case. Upon the undisputed facts, the defendant executor was not guilty of any actionable neglect in not bringing suit to recover the bonds or their proceeds from Miss Murphy, the residuary devisee and legatee. For months after the completion of the advertisement for creditors, the defendant was ignorant of the existence of the claim of plaintiff, and the defendant had in his possession enough funds of the estate to pay all of its known debts without seeking to recover the possession of these bonds from Miss Murphy. After the claim of the plaintiff was made known, the defendant was advised by his counsel, to whom he made a statement of the facts, that he had no case against Miss Murphy for the recovery of the bonds or their proceeds. This was probably based upon a consideration of the question of what proof the defendant could make that the bonds were in fact the property of his testator at the time of his death. The result of an action would have been quite problematical, as we can see, and we should be loath to hold this executor, considering the facts of the case, liable as for a *devastavit* for not taking legal proceedings, and thereby seeking to recover the bonds, or their proceeds, notwithstanding his counsel advised him that he could not maintain such action. There is no pretense that the defendant did not act in entire and perfect good faith in the matter, nor can there be any question of the *bona fides* of his counsel. An executor who has acted in good faith, and intended fairly and fully to discharge his duty, will not be charged in this manner, if such intentions have been directed by a reasonable judgment; while, if the property of the decedent has been wasted through his carelessness and want of proper attention, he will be liable. This rule was laid down by Mr. Justice NELSON in *Schultz* v. *Pulver*, 11 Wend. 363, 366, where the administrator was held liable in a very plain case.

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If there is reasonable ground for considering that the legal steps to be taken to collect assets by the executor would have been ineffectual, then the failure of the executor, acting in good faith, to take them does not render him liable as for a *devastavit*. *Clack* v. *Holland*, 19 Beav.. 262, 271.

It is true in the case in Wendell, above referred to, it is stated that if the debts are not collected within a reasonable time after the issuing of letters, either by personal application or by suit, the executor is responsible for such neglect. But it is seen that the court refers to such debts as could have been thus collected, not to those where a suit would have been unavailing. The *onus* is upon the executor to show a fair reason why he did not commence proceedings to collect a debt, and it is only necessary in the first instance for him who insists upon a *devastavit* to show the existence of a debt, and that the executor has taken no steps to collect it. The presumption is that it could have been collected, as the usual course is for men to pay their debts, and solvency is presumed until the contrary is shown. This is what was decided in *Stiles* v. *Guy*, 16 Sim. 230, 39 Eng. Ch. 229; the vice-chancellor remarking that "those who seek to exonerate themselves from a debt due from a third person ought to prove that that person could not have paid the debt. If a debt is due, the law presumes, until the contrary is shown, that the debtor can pay it. Insolvency cannot be presumed." The same principle is upheld in *Harrington* v. *Keteltas*, 92 N. Y. 40, where this court held that the executor, hearing of a debt due the estate, was bound to active diligence for its collection, and that he could not wait for a request from the distributees. The existence of the debt being proved, the duty of active diligence was enjoined upon the executor. In that case, and upon the facts therein appearing, the court, per DANFORTH, J., regarded the neglect to prosecute not only as an omission, but as a willful default amounting to positive collusion.

Active vigilance is a relative term, and what it is

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depends upon the facts appearing in each case. As to where the *onus* lies in making proof of the facts, there can be but little question. A debt being proved, the presumption is that it is collectible, as solvency, and not the contrary, is to be presumed. But when the *onus*, being shifted to the executor, is met by proof on his part of the absolute, irretrievable, and hopeless insolvency of the debtor, does any rule of active vigilance demand the institution of legal proceedings by the executor against such insolvent debtor? Does active diligence require the commencement of an action to obtain possession of property which the executor claims belongs to the estate, although at the same time he does not know how he can prove that the property does belong to it, and he is also advised by his counsel, in good faith, that he cannot make such proof, and he really believes it? All the facts being in, the question arising for determination is whether the conduct of the executor has been guided by good faith, reasonable judgment, and an intention to fairly and fully discharge his duty. If so, it cannot be that he should still be held liable for a *devastavit*. No duty of active vigilance would make it necessary to sue an absolute and hopeless insolvent, nor to commence an action when he was entirely ignorant as to where to find the proof to maintain it.

In this case we cannot see that the executor, under all the facts, was guilty of such a lack of diligence as should charge him with the value of these bonds. The result of a suit was entirely too doubtful to require us to hold the executor liable for not instituting it, especially, when, in good faith, and after, it is to be presumed, a full statement of all the facts, his counsel advised him that he had no case, and he believed it and acted accordingly.

Another question arises upon this accounting. The testator, by his will, bequeathed to his executor $500 to be expended by him in having masses said for the repose of the soul of the testator. He has expended but $250 belonging to the estate for that purpose; the

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other half of the $500 having been contributed by the residuary legatee.

The plaintiff claims that the defendant is liable for the $250 thus paid out by him, upon the ground that the bequest to the executor in trust to pay out moneys for masses was wholly void, and the executor had no right to follow out the instructions of the testator in that behalf.

The bequest, as made in this instrument, was void. It has been so held by this court in the very recent case of *Holland* v. *Alcock*, 108 N. Y. 312, 16 N. E. Rep. 305. The case was decided subsequent to the payments made by the defendant herein. It is claimed by him that he is not liable to further account for this money, because he paid it as directed by the testator, and in good faith, at a time when it had not been decided that such a bequest was void; and his acts, done in good faith in carrying out the requirements of his trust, should, until such or a similar trust was declared invalid, be upheld, and he should be indemnified by the decree of the court from all liability therefor. I am not prepared, upon this statement, to admit that the good faith of the trustee would furnish a defense to the demand of the plaintiff. Property which is given to trustees by a will upon a void trust, or one which cannot be executed, is held by them for those persons to whom the law or the other provisions of the will give property which is undisposed of. *Ommanney* v. *Butcher*, 1 Turn. & R. 260; *Morice* v. *Bishop of Durham*, 9 Ves. 399, s. c. 10 Ves. 521, 535; *Vezey* v. *Jamson*, 1 Sim. & S. 69; *Association* v. *Hart's Ex'rs*, 4 Wheat. 1, 28; *Hawley* v. *James*, 16 Wend. 61, 134, 180, 267. Many of these cases were those of bills filed by the next of kin or heirs at law to have the trustees turn the property over to them, because the trust was void.

Upon the accounting of the trustees after the trust had been declared void, it would seem to be rather a startling proposition that they were to be indemnified for all payments made in good faith before such declaration. This doctrine would permit a person named as

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trustee to execute the trust, if it or a similar trust had never been declared to be void, if the trustee acted in good faith. On the contrary, it would seem generally as if a trustee acted, in carrying out the trust, at the peril of being able to maintain its validity when called upon. Trustees are favorites with courts of equity, and for that very reason they can at all times apply to the court to be informed as to their duty, or as to the validity of the trust which they have undertaken to carry out. Having this right, where their title to the funds depends upon the validity of the trust, as evidenced upon the face of the instrument, it is not too much to say to a trustee, under such circumstances, if there be the least possible doubt of the validity of your title, bring the parties who might be interested in that question into court, and there have a judicial determination of its validity, and that determination will be a perfect protection for all your acts. If a trustee, in a case involving any doubt, chooses to go on and carry out the provisions of the trust, he has but himself to blame in case of disaster.

It is true that in *Hawley* v. *James* the court held the trust to be void, and the decree provided indemnification to the trustees for all acts done and moneys paid by them in good faith prior to the decree. There is no detailed statement as to what those acts were, or for what the moneys were paid. Many acts might have been performed, and money paid, for the benefit of the estate. But the case is no authority on this point, for the indemnity was claimed by the counsel for the trustees and was assented to by all the other interests, and passed by virtue of such consent. (See bottom of page 272 in the report in 16 Wend.)

In *Smith* v. *Dresser*, 35 Beav. 378, L. R. 1 Eq. 651, the trust deed was void, and the person otherwise entitled to the property brought an action to recover it from the trustee, who asked for a decree permitting him to retain the costs and expenses he had, in good faith, incurred prior to the commencement of the action. Lord ROMILLY, Master of the Rolls, denied the motion.

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and said, the trustee having been appointed under a trust deed which was invalid, he should have known the fact before he proceeded. That although on the face of the deed it was alleged that three-fourths of the creditors had consented, such was not the fact, and inquiry would have shown it. That a trustee was entitled to have his costs of executing trusts existing and valid, and which he has undertaken to perform, but if the trusts are invalid he has no trusts to execute, and is not competent to execute any.

And, as such trusts were invalid, the trustee had no duty to perform, and he ought to have paid the money over at once. This is said of a case where the trust deed was not even void on its face, but because of an extrinsic fact, viz., the failure of the necessary number of creditors to consent to it.

The case of *Elsey* v. *Cox*, 26 Beav. 95, is to the same effect. If the trust estate is invalid, the title of the trustee is as trustee for those persons upon whom the law devolves the property in such cases; and it would seem to be no answer to them, when they demanded the property, for the trustees to say they paid it out under the illegal trust, but still in good faith. There are cases, no doubt, where the trustees are protected for acts performed in good faith under an instrument creating the trust, where the instrument is subsequently declared void. Such cases are cited in the opinion in *National Butchers' & Drovers' Bank* v. *Hubbell*, (decided at this term.) I have found, however, no case upholding the bald proposition that all acts of a trustee done in good faith are protected by the instrument creating the trust, even though such instrument is entirely void. It is not, however, necessary to decide this case upon any such proposition, and we shall not therefore do so. There are other facts existing here which alter the case of the defendant, and place him in such a position that the court is enabled to protect him in his payment. The property in question was, like all the rest of the testator's property, bound for the payment of his debts. After their satisfaction it was subject

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to the testator's disposal by will. This money was, by the testator's will, to be disposed of in the purchase of masses, and, the debts being paid, if such bequest were invalid, the only one to complain if the executor obeyed its requirements was the residuary legatee. The executor properly and legally advertised for the presentation of all claims against the decedent to him, in order to their satisfaction, if there were property enough. The plaintiff's claim was not presented during the running of the six months, nor for six months thereafter, and the executor was ignorant of its existence. At the end of the six months the executor was in this situation: All the debts of the estate that he knew anything about amounted to no more than he had ample funds in his hands to pay. The only person, therefore, who could, so far as he knew, raise any objection towards his payment of the money for the purchase of the masses was the residuary legatee, and he knew that she wanted it done. For six months after the conclusion of the advertisement, the plaintiff still neglected, not only to prove his debt, but even to present it, or allege its existence. No reason is given for such omission and neglect. We think that, under such circumstances, the plaintiff should be estopped from the prosecution of this claim against the trustee.

The testator died in the spring of 1883, and his will was proved in August of the same year; and it was not until April, 1885, that the plaintiff presented his claim, or that the defendant was apprised of its existence. A delay in presenting a claim against the estate of a decedent of more than a year and a half after the probate of a will, and for six months after the expiration of an advertisement for claims against the estate, wholly unexplained, is, in a case like this, sufficient reason for denying the claim of the plaintiff against the trustee to repay moneys paid out by him in good faith, in accordance with the terms of the will, and with the wishes of the only person who, so far as the trustee knew, or with diligence could ascertain, had any interest in the estate.

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After the expiration of the six months of advertisement, the defendant had a right to rely upon the assumption that all claims had been presented which existed against the estate. Upon such assumption, and upon the consent of the residuary legatee, he was justified in paying the money for the masses. The plaintiff should not now be heard, in his claim against the trustee to recover from him the amount of such payment, when, by his own neglect, he rendered such payment possible, and seemingly in all things proper and called for.

Upon the ground of the conduct of the plaintiff in omitting to present his claim, he should be barred from its prosecution against the trustee. The defendant is within the equity, although not within the letter of the statute (2 Rev. St. p. 89, § 39) relative to payments made by an executor, etc., as against one who has neglected to present his claim within six months after the first publication of notice to creditors.

The order of the general term should be affirmed, with costs to the defendant out of the estate.

All concur, except Ruger, C. J., not voting.

Order affirmed.

See further as to charitable and superstitious uses, Minot v. Baker, 7 Am. Prob. Rep., *supra*, 43; Stratton v. Physio-Medical College, 7 Am. Prob. Rep., *supra*, 55; Bullard v. Chandler, 7 Am. Prob. Rep., *supra*, 191.

SHERMAN *vs.* LEWIS.

(44 Minnesota, 107.)

ELECTION.—EVIDENCE OF TESTATOR'S INTENTION.

In order to raise a case for an election by a beneficiary under a will on the ground that the testator assumes thereby to dispose of property which he had previously given to the same beneficiary by another instrument, it must very clearly and satisfactorily appear

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that the testator has intentionally assumed to dispose of the property of the beneficiary, who is required on that account to give up his own gift; and this intention must appear from the words of the will itself, and cannot be proved by evidence *dehors* the instrument.

APPEAL from a judgment of the District Court of Ramsey County. The opinion discloses the facts.

W. K. Gaston, for appellants.

Henry G. James, for respondent.

MITCHELL, J. All that is necessary for the decision of this appeal is to compare the provisions of the marriage settlement by the testator upon the respondent with the operative provisions of his subsequent will, in order to acertain whether it clearly appears from the will that the testator thereby assumed to dispose of what he had previously given the respondent by the settlement. If it does so appear, then, under a familiar rule, respondent is put to her election, and must give up her gift under the settlement in order to take under the will; otherwise, she may retain her rights under the settlement, and also take under the will. The marriage settlement gave her, subject to certain conditions, the usufruct of certain real estate during her natural life. The operative part of the will made certain specific bequests, and then bequeathed and devised "all the rest, residue, and remainder of the property, real, personal, and mixed, and wherever situated which shall remain to me at my death."

The rule is that a general bequest and devise of the testator's property will be construed as intended to extend only to such property as he could dispose of by will. Also that, even where specific property is disposed of by will, in which the testator had only a partial interest, the courts will, if possible under any reasonable rule of construction, construe the language of the will as intended to apply only to the interest which the testator was able to dispose of; the presumption being that he did not intend it to apply to that over which he

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had no disposing power. Also that, in order to raise a case for an election, the intention as manifested by the will itself must be clear and decisive. It must be clear, beyond reasonable doubt, that the testator has intentionally assumed to dispose of the property of the beneficiary, who is required on that account to give up his own gift. 1 Jarm. Wills, (5th Ed.) 452-454; 2 Redf. Wills, 475, 476; *Havens* v. *Sackett*, 15 N. Y. 373; *Washburn* v. *Van Steenwyk*, 32 Minn. 336-352, 20 N. W. Rep. 324; *In re Gotzian*, 34 Minn. 159-164, 24 N. W. Rep. 920. And while parol evidence is admissible, to the same extent as in other cases, in aid of the construction of written instruments,—that is to show the condition of the subject-matter, and the surrounding circumstances, so far as to place the court in the position of the testator,—yet the intent of the testator to dispose of that which was not his must appear from the words of the will itself, and cannot be proved by evidence *dehors* the instrument. 1 Jarm. Wills, 451, 452.

Applying these rules to the present case, the general words of description of testator's property, "which should remain to him at his death," certainly cannot be construed as showing any intention on his part to dispose of the interest of the respondent in the real estate referred to under the previous marriage settlement. The appellant contends, however, that because in the first part of the will (which by its terms never became operative, for the reason that the testator left a wife and child surviving him), he devised this real estate without any expressed limitation or qualification as to the extent of the interest intended to be disposed of, this must be construed as showing an intention to dispose of the whole property, including respondent's interest, and that the second and operative part of the will is to be construed as intending to dispose of the same property as was intended to be disposed of in the first. Under the rules already laid down, it will at least admit of doubt whether appellant's construction of the first part of the will is correct; but, even conceding that it is, their conclusion sought to be drawn from that fact

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as to what was intended to be disposed of by the second part, is clearly a *non sequitur*. But there is one thing that deprives this contention of appellant of all force. By an examination and comparison of all the provisions and conditions of both the will and the marriage settlement, it will be seen that the marriage settlement, and the devise of this real estate contained in the first part of the will, could never both be operative and in force at the same time; for the settlement was only to take effect in case the respondent within three months became the wife of the grantor, and the devise in the will was to be void and of no effect in case the testator left a wife surviving him. Our conclusion is that respondent is not put to an election, but may retain her property under the settlement, and also take under the will.

Judgment affirmed.

See further in respect of election, Brown v. Brown, 7 Am. Prob. Rep., *supra*, 132.

BANNISTER *vs.* JACKSON.

(45 New Jersey Equity, 702.)

TESTAMENTARY CAPACITY.—INTOXICATION.

The test of testamentary capacity is that the testator can comprehend the property that he is about to dispose of, the objects of his bounty, the meaning of the business in which he is engaged, the relation of each of these factors to the others, and the distribution that is made by the will.

The effect of present intoxication and mental disease, induced by habitual indulgence in intoxicants, must be measured by the test indicated; for both may exist in some degree without destroying testamentary capacity.

APPEAL from a decree of the Orphan's Court of Essex County. The facts appear in the opinion.

C. W. Riker, for appellants.

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M. T. Barrett and *Henry Young*, for respondent.

THE ORDINARY. This appeal is from a decree of the Orphans' Court of Essex County, which directs that a paper, purporting to be the last will and testament of George M. Bannister, be admitted to probate. The paper was executed in accordance with the requirements of the statute on the 24th of April, 1884, and on the 22d of March, 1887, the testator died of chronic alcoholism, at the German Hospital, in the city of Newark. The appellants are his widow and only child. By the disputed paper, $500 is bequeathed to the widow, and declared to be in addition to her dower right, and $500 is given to the daughter, Caroline J. Marsh, who was then a widow, and provision is made that that sum shall be her own property, free from the control of her husband, Edward Marsh. The residue of the estate is divided equally between the four brothers of the testator, who reside in England, with the proviso that, in case two of the brothers, who are named, should die before the testator, without leaving issue, their share shall be divided equally between the surviving brothers or their heirs. John Jackson, a friend and former business agent of Mr. Bannister, is named as the executor of the will, and power is given him to sell real estate.

The estate disposed of is valued at from $12,000 to $15,000, and consists entirely of personal property.

When the will was made the testator and Mr. Jackson were the equitable owners of a farm at Brookdale, in this State, the legal title to which was in the name of one McCartney, who held it in trust for them, and the testator alone was the equitable owner of a house and lot in the city of Newark, the legal title to which was then held in trust for him by Mr. Jackson.

The admission of the will to probate is resisted upon the ground that, at the time of its execution, Bannister did not possess testamentary capacity. It is insisted that he had become an habitual drunkard, was afflicted with chronic alcoholism, and at the very moment of

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the paper's execution was so far intoxicated that he did not comprehend the act in which he was engaged.

Bannister was married to the appellant, Caroline F. Bannister, in 1855. She had been married before, but was then a widow. By her he had a daughter, the appellant, Caroline J. Marsh. Until 1875 he was a prosperous slipper manufacturer in Newark. In that year he commenced to use intoxicating liquors to excess, and a year later, left his wife and daughter to live with a woman of disreputable character, and from that time until his death he continued in excessive indulgence in intoxicating drink. Witnesses describe the quantity of liquor that he consumed as "enormous." When sober he was nervous, sleepless and irritable. His hand trembled continuously. He spoke of seeing strange figures and imps, and otherwise exhibited characteristics of the habitual inebriate. Yet, notwithstanding his condition, he managed to keep his business together, and at about the time of making the paper in question, to sell it at considerable advantage.

Sometimes he appeared to be afflicted with dullness and loss of memory, and at other times he exhibited a keen, shrewd capacity for business, and a strong will. In the spring of 1884 he declared that he had determined to go to Europe for the benefit of his health, and then made the advantageous sale of his business above spoken of, and at about the same time he transferred to his mistress, in settlement of all her claims upon him, the furniture of the house in which they had lived together. He then made the will in dispute, and then, for the benefit of his health, went for two weeks to his Brookdale farm and then to England. During all the time that he was separated from his wife and daughter, except while he was in England, he contributed to their support, remitting to them weekly a certain allowance. While he was in England his daughter wrote to him for assistance, and he answered her by the following letter, which should be inserted here because of its value in ascertaining his condition of mind and capacity at the time he wrote it.

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"London, July 12th, 1884.

Carrie: Your letter just received. Glad to hear that all is well. You will please to understand that I am so placed that I cannot occupy but one home. I have for over nine years gave you and your ma a good living. Now there is a change. If your mother wants me, I will make arrangements to come, and I will make her as happy as a man can make his loving wife. Yours, G. M. B. P. S. I have sent by mail to Mr. Jackson to carry out all arrangements that you might make. Now, to you, my D. Can you lay your head on your pillow at night, and say to your God that you have been a loving, faithful child? If you can, then your God is not mine. G. M. B."

In August of the same year he returned to Newark, and immediately took up his residence with his wife and daughter, and remained with them until some time in the following December. He had not been able to break his pernicious habits, and while he thus lived with them, he was seldom sober. In December he returned to his mistress, and resided with her until he died, in the spring of 1887.

For some years before he went to England he had been the vice-president and a director of the Mutual Building & Loan Association of Newark. When he went to England he resigned these offices, but upon his return from England was re-elected a director of the corporation. The president of that association says that he was valued as a man of excellent judgment, and was frequently selected to act upon committees to audit accounts and appraise the value of property upon which loans were to be placed. He was not thought by this witness to be incompetent to transact business until a month or two before his death. After his return he was employed by Thomas Phaup, a slipper manufacturer, as the manager and foreman of his business, and for fifteen months was paid $15 a week in that capacity. During this employment he loaned Phaup $1,000, taking security for the loan, and so managed

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that he ultimately became the owner of Phaup's business. Up to the time of his death he kept a bank account in his own name. His money was chiefly invested in mortgages placed by himself, the interest from which he or his friend Jackson collected. While he was in England Jackson managed his affairs, and rendered him regular accounts. His securities were always kept in Jackson's safe.

The proofs satisfy me that at the time the will was made Bannister had become addicted to the excessive use of intoxicating liquors, and that, to some extent, such indulgence had impaired both his mental and physical powers, and had probably contributed to the degradation of his moral character, but at the same time, I am quite satisfied that the impairment of his mental faculties did not extend so far as to render him incompetent to perform a legal act when he was not under the immediate influence of intoxication. The test of testamentary capacity in this State is that the testator can comprehend the property he is about to dispose of, the objects of his bounty, the meaning of the business in which he is engaged, the relation of each of these factors to the others, and the distribution that is made by the will. The capacity required is moderate, and, though the testator be subject to many infirmities, though he be feeble, absent-minded, forgetful, aged, diseased, blind, or otherwise infirm, and yet possess the powers required by this test, he will be held to have testamentary capacity. *Waddington* v. *Buzby*, 18 Stew. Eq. 173, 43 N. J. Eq. 154, 10 Atl. Rep. 862. I am entirely satisfied that Mr. Bannister had testamentary capacity at the date of the document in dispute. Much stress was laid by the counsel for the appellant upon the fact that the will provided that the money which was left to the testator's daughter was to be free from the control of her husband, when in fact, at the time the will was made, that husband had been dead two years. The daughter's marriage, her separation from her husband, the husband's death, and the making of the will, all occurred while Bannister lived

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apart from his wife and daughter. The testimony that he had been informed of the death of his son-in-law comes from the daughter alone. Possibly she may be mistaken as to her statement of it, or possibly it may have been conveyed to him at a time when he was under the influence of strong drink, and incapable of appreciating or remembering the information. His separation from his wife and daughter, and the daughter's separation from her husband, created a situation of affairs in which the death of the son-in-law would fail to disturb existing relations, so as to emphasize it and impress it upon his memory. I cannot but believe that the testator's failure to remember the death when he made his will must be attributed to other cause than disease of mind or incapacitating failure of memory.

The remaining inquiry is, whether, at the very time of the making of the will, the testator was under the influence of liquor? The three persons present at the execution of that paper have been sworn. John Otto, the justice of the peace and conveyancer who drew the will, was not directly questioned upon the subject, but he says that Bannister came to his office at about ten o'clock in the morning, and told him that he was going to Europe, and that he desired to arrange his affairs before he left, and then gave Otto directions for the will, and as Otto says, the ideas to put in it. Otto then told him that he must have another witness, and he went out, saying that he would get Frank J. Merz. Mr. Merz was a saloon-keeper near by. He says that Bannister came in his saloon at about eleven o'clock in the morning, and called him aside, and asked him if he would be a witness to his will, and that he (Merz) assented, and went with him. He further says that Bannister was a little excited, and that he (the witness) thought that he had been drinking a little, for he smelt the liquor upon him, and Bannister seemed to be nervous. John Jackson, who was also present at the execution of the will, states that Bannister either came to him or met him that morning, and requested him to accompany him (Bannister) to Mr. Otto's office, where

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he proposed to have his will drawn. He told Jackson that he was going to Europe, and that he wished Jackson to be the executor of the will. Jackson says that the testator was sober and knew what he was doing. When the will was completed Mr. Otto read it, and after it had been executed Bannister paid Otto for drawing it, and handed the will to Jackson. It may be that Bannister had been drinking immediately before his will was made. Merz says that he had been drinking a little, was a little excited, to use his expression, was "kind o' nervous," but he does not pretend to say that Bannister did not appreciate the business in which he was engaged. To Jackson he seemed to be sober, and that which he did and said throughout the transaction seems to clearly indicate that he was not intoxicated; at all events, to such a degree as to disorder his faculties or pervert his judgment. In *Peck* v. *Cary*, 27 N. Y. 9, 23, Chief Justice DENIO said: "It is not the law that a dissipated man cannot make a contract or execute a will, nor that one who is in the habit of excessive indulgence in strong drink must be wholly free from its influence when performing such acts. If fixed mental disease has supervened upon intemperate habits, the man is incompetent and irresponsible for his acts. If he is so excited, by present intoxication as not to be master of himself, his legal acts are void, though he may be responsible for his crimes."

My conclusion, after a careful examination of this case, is, that at the time the will in dispute was made Mr. Bannister's habitually excessive indulgence in strong drink had not produced a fixed mental disease sufficient to destroy his testamentary capacity, and that at the very time of the execution of that document he was not so intoxicated that the act in which he was engaged was vitiated. I will therefore affirm the decree of the Orphans' Court.

See further as to testamentary capacity, Layman's Will, 7 Am. Prob. Rep., *supra*, 127; Hammond v. Dike, 7 Am. Prob. Rep., *supra*, 146; Mitchell v. Mitchell, 7 Am. Prob. Rep., *supra*, 170; and the cross-reference notes.

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LUPER *vs.* WERTS.

(19 Oregon, 122.)

EXECUTION.—EVIDENCE.—PROBATE.

Under the statute of Oregon, every will, in order to be effective, is required to be in writing, signed by the testator, or by some other person, under his direction, in his presence, and attested by two or more competent witnesses, subscribing their names to the will in the presence of the testator.

The acknowledgment, however, cannot be inferred from mere silence. LORD J., dissenting.

To prove the execution of the will, it must be shown that the witnesses who subscribed their names to it did so at the request of the testator; that they saw him sign it, heard him acknowledge it, or observed acts which unmistakably indicated that he had signed it.

And, in order to admit the will to probate, it must be proven to have been so signed and attested, and that the testator, in the case of the disposal of goods and chattels, was over the age of 18 years, and, in the case of the disposal of real property, was of 21 years of age and upwards, and was of sound mind.

The proof of a will should not fail because the testimony of the subscribing witnesses thereto is insufficient to establish its execution, provided it can be proven by other competent evidence or by circumstances clearly indicating its execution; but, where such proof is not made, courts have no more authority to adjudge the will effective than they would have to attempt to enforce an oral expression of a party regarding the disposition which should be made of his property at his death.

APPEAL from a decree of the Circuit Court for the County of Linn reversing a decree of the County Court of said county rendered in a matter of probate of the alleged will of Martin Werts, deceased. On the 3d day of November, 1888, the appellant, Sarah L. Luper, filed in said county court a petition to vacate the order admitting said will to probate, alleging in her petition that she was the daughter and only heir at law of the deceased, except the widow of deceased, Mary Werts, and that the pretended will was void in that the testator did not make, sign or declare, in the presence of the witnesses to the instrument, that it was his last will and testament, nor was it attested by such witness-

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es; that the testator was not, at the time of signing the instrument, of sound mind and memory; and that he was induced to sign the same by undue influence exerted over him by said Mary Werts and others named as legatees and devisees therein.

J. K. Weatherford and *W. R. Bilyeu*, for appellant.

Hewitt & Irvine and *Chas. E. Wolverton*, for respondents.

THAYER, C. J. It appears from the allegations and proofs herein that Martin Werts and Mary Werts were husband and wife; that at the time of their marriage said Martin was a bachelor, and said Mary a widow, had been the wife of one Smith, by whom she had several children then living; that after the marriage said Martin became the head of the family, and nurtured and supported the said children during their minority; that he and the said Mary had, as the fruit of their marriage, a daughter, the said Sarah L. Luper, appellant herein; that, after the said Martin Werts arrived at the age of about 70 years, and became enfeebled in health, he conceived the idea of making a will disposing of his property, which consisted mainly of a tract of land in the town of Tangent, Linn county, and employed one J. J. Beard, a resident of said place, who was supposed to have some skill as a scrivener, to prepare it for him; that the said Beard subsequently prepared a writing to which the said Martin Werts, on the 17th day of July, 1888, subscribed his mark, and which was also subscribed by M. Peyser and said Beard as witnesses. The said instrument is as follows:

"This my last will and testament: I give to my wife all of my farm and appurtenances, also my houses and lots in Tangent, during her natural life, also all the personal property she can dispose of at her will; and at her death the farm shall be divided as follows: That part of my farm lying north of the county road running through my farm shall be divided equally north and

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south. I give to Sarah Luper, my daughter, the east half of said land, containing (82) eighty-two acres, more or less, and the west half I give to Mary E. Simpson, the wife of J. H. Simpson; and all of the farm lying south of said county road I give to my grandaughter Mary Smith, also give my organ to Mary Smith. I also give my house and lots in Tangent, (at the death of my wife, Mary Werts,) to Lucinda Smith, the wife of L. F. Smith. I name and request E. L. Bryan to be the executor of this will.

"His

"Witness: "Martin X Werts

"M. Peyser. "mark.

"J. J. Beard.

"Dated this 17th day of July, 1888."

The said Sarah L. Luper mentioned in said writing was the daughter of the said Martin Werts; the said Mary E. Simpson, a daughter of his wife by the former marriage; the said Mary Smith, a granddaughter of his wife, a daughter of her son, by the former marriage; and the said L. F. Smith, husband of the said Lucinda Smith, was a son of the wife by her former marriage. Mary Smith, the granddaughter, had resided with Martin Werts from the time she was six months old, and had been reared by him and his wife as their child.

That the said Martin Werts, at the time he executed the said writing, was competent to make a will, I think, was established by the evidence beyond a question. He was able to comprehend the condition of his property, his relations to the persons who were, should, or might have been, the objects of his bounty, and the scope and bearings of the provisions of the writing he intended as his will, which was held by this court in *Chrisman* v. *Chrisman*, 16 Or. 127, 18 Pac. Rep. 6, to be sufficient evidence of testamentary capacity. Nor do I think that the evidence in the case was sufficient to warrant the presumption that undue influence was exercised over the said Werts in regard to the disposition which he should make of his property in view of

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death, or which induced him to execute the said writing he intended as his will. Nor do I discover from the provisions of the writing any evidences that the signer of it was actuated by a spirit of bias or prejudice against any one who might be expected to be the recipient of his bounty, or in favor of any one upon whom he sought to bestow it. His bequest to his wife of his real property during her natural life, and all the personal property absolutely, was, under the circumstances, a just and wholesome provision, and displayed wisdom and forethought. She was an old lady, and was entitled to security against want and dependence, and to that attention which the possession of property commands. Why he attempted to bequeath to Mary E. Simpson a part of his farm, or to Lucinda Smith the house and lots in Tangent, does not appear; but it certainly was not strange or anomalous, under the circumstances of their relations. And the bequest to Mary Smith, a child he had raised from an infant, and who was still of a tender age, requiring provisions for her support and maintenance, was very natural and proper. The appellant, it is true, was his own child, and it would ordinarily be expected that he would bestow the main part of his property upon her; but he was under no legal or moral obligation to do so. She had a husband, and her father may have considered that her pecuniary circumstances were already adequate to her condition in life. Children have no vested rights in the property of their father while he is living, or any interest in it beyond a bare expectancy, the realization of which depends entirely upon his will; and, if he were to disinherit them, it would not affect the validity of his will, except as it evinced an unnatural feeling which, if proved to have been engendered by some designing party, might be evidence of undue influence. The more serious question in the case is, whether the said writing was executed with the formality which the law requires in the execution of wills. The statute of this State section 3069, Ann. Laws provides: "Every will shall be in writing, signed by the testator, or by

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some other person under his direction, in his presence, and shall be attested by two or more competent witnesses subscribing their names to the will in the presence of the testator." And it was held by this court in *Hubbard* v. *Hubbard*, 7 Or. 42, that "where a will has been probated in common form, and the validity of the will is attacked by direct proceedings, it lies upon the person seeking to maintain the validity of the will to reprobate the same by original proof, in the same manner as if no probate thereof had been had, except as to such matters as are admitted by the pleadings. In every such proceeding the *onus probandi* is upon the party propounding the will." This seems to be regarded as the proper rule upon the subject, and I believe it to be correct in principle. The formal probate having been made *ex parte*, is not considered of any importance when the validity of the will is attacked by a direct proceeding. The practice, however, in such cases would be very much simplified if the legislature were to require the probate court, when a petition for the probate of a will was filed, to issue a citation, to be served upon the parties interested in the estate, to show cause why the will should not be admitted to probate, and have any contest which might be made against it determined upon the return of the citation. In the latter case the burden of proof to show that the will offered for probate was executed according to law would be upon the proponent; and the court, in *Hubbard* v. *Hubbard*, *supra*, seems to have concluded that the same rule would obtain upon a direct attack of the validity of the will after a formal probate thereof had been had, which seems to me to have been a reasonable conclusion.

The determination, therefore, that the said paper signed by the decedent, and evidently intended as his last will and testament, was executed in conformity with the requirements of the section of the statute above set out, must depend upon the sufficiency of the evidence given upon the part of the proponents to establish the fact.

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The legislature, for obvious reasons, required the observance of certain forms in the execution of a will. It requires that the will shall be attested by two or more competent witnesses subscribing their names to it. The said paper was signed by two persons who were competent to be witnesses; but whether they attested it as required by the statute is the question to be solved under the evidence given, and facts and circumstances surrounding the transaction. Proof of the attestation does not alone depend upon the testimony of the subscribing witnesses to the will. The latter may have both died, still the proof could properly be made. In the latter case, proof that their signatures to the will were in their own handwriting would probably be sufficient, but in this case the proponents have attempted to establish proof of the attestation by the testimony of the subscribing witnesses and that of others.

The testimony upon that point is substantially as follows: J. J. Beard, one of the subscribing witnesses, in answer to interrogatories propounded to him, testified that he was 44 years old, resided at Tangent, and was a railroad agent; that he had resided there since 1873; that he was acquainted with Martin Werts in his lifetime, had been acquainted with him 12 or 13 years; that he transacted business for him—made out a deed, acknowledged a mortgage, and wrote out a will for him; that the will was made July 17, 1888, at the request of Werts, who told him what provisions to make in the will at the time it was made, the names of the legatees mentioned in the will, and all the terms thereof.

Question. Did he seem to comprehend at that time what property he had? Answer. He named over what is mentioned in the will.

Q. State whether he seemed to know and comprehend the names of the heirs, and those dependent on his bounty? A. He named over all that are mentioned in the will.

Q. Where was the will written? A. At my office at Tangent, Linn county, Oregon.

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Q. Where was it signed? A. At the same time.

Q. State how it was signed? A. Mr. Werts signed it by a mark.

Q. What kind of a mark, and who made the mark? A. It was a mark made with a pen and ink,—a cross. I made the mark while Mr. Werts had hold of the end of the pen.

Q. Who wrote the name at the bottom, "MARTIN WERTS," and the words "his mark," above and below the cross? A. I did.

Q. At whose request? A. Well, I don't know whether he requested me to write it or not. I don't think he did. I asked him if he could sign it, and he said: "No, he couldn't write." I wrote his name, and asked him to make his mark.

Q. Did you know whether it was his desire to have you write his name for him, or not? A. I do not know whether it was or not, but presume it was.

Q. State whether he knew you wrote it, and assented to your writing it. A. I told him I wrote it. Don't know that he made any remark. Don't know that he said anything at all.

Q. He made his mark, as you have described, after the will was written? A. Yes sir.

Q. State whether the will was read to him or not. A. Yes, sir; it was.

Q. Before or after he signed it? A. Before he signed it.

Q. State whether or not he was satisfied with the provisions contained in it when it was read to him. A. He did not say whether he was or not.

Q. What did he say when you read it (the will) to him? A. I read it to him, and asked him if that was right, and he said: "That is the way mother said to do it."

Q. He understood, then, fully what was in the will at the time he signed it? A. I read the will to him.

Q. Who are the witnesses to the will? A. M. Peyser and J. J. Beard.

Q. J. J. Beard is yourself, isn't he? A. Yes sir.

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Q. How did you come to sign as a witness? A. There was no one else there to sign it except me and Mr. Peyser that I knew of at the time.

Q. Well, you can state how you came to sign it as a witness, and why you signed it as a witness. A. I knew it was necessary to have two witnesses to it, and there was no one else there to witness it, that I was aware of, at the time, except Mr. Peyser and myself.

Q. State whether you signed it as a witness in the presence of Mr. Werts? A. Yes sir.

Q. State how Mr. Peyser came to sign it as a witness. A. I asked him to.

Q. How did you come to ask him to sign it? A. I wanted another witness to it, and he was the only man there, and I asked him.

Q. Did Mr. Werts hear you ask him? A. I do not know that he did. I went out of the room to get Mr. Peyser. He was out on the front porch when I stepped out. He might have heard me.

Q. What knowledge did Mr. Werts have that you were about to get or were getting another witness at the time you went to get Mr. Peyser, or before going? A. I presume I told him I was going to call another witness.

Q. How far did you find Mr. Peyser from where you were writing the will? A. About forty feet.

Q. How long had Mr. Peyser been there? A. Probably 10 or 15 minutes. Could not say, positively.

Q. Could he have heard what you were saying to Mr. Werts? A. He might have heard part of it. Don't know that he did. Could if he had been listening to hear me read the will.

Q. What did you say to Mr. Peyser when you got him to witness the will? A. I asked him to come in and sign this as a witness.

Q. State what he said when he signed it. A. I believe he asked me if it was a note, and I said "No;" and he said it would not make it any better by his name being on it than it was. I believe that was all that was said.

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Q. Did Peyser know what he was signing, and the capacity in which he was signing, when he signed it as a witness? A. He knew the capacity in which he was signing. Don't know whether he knew it was a will or not, but presume he did. Couldn't say positively.

Q. Why did you presume that he knew it was a will? A. Well, he could have heard me reading it, if he had been listening, and ought to have known what it was, if he heard it.

Q. How long after you signed it until you called Peyser to sign it? A. I called Mr. Peyser to sign it before I signed it at all.

Q. State whether M. Peyser looked at the instrument and saw the manner in which Mr. Werts had signed the paper. A. I don't know whether he did or not. I called him in, and he sat down and signed the paper.

Q. Did he sign after Mr. Werts had made his mark? A. Yes, sir.

Q. Was he acquainted with Mr. Werts, do you know? A. Do not think he was. Do not know, but do not think he was.

Q. How long did Peyser remain in the room? A. I think he got up and went right out as soon as he signed his name. It was a very small room, and there wasn't room for so many in there.

Q. Before or after you signed it as a witness? A. I think he stepped right out of the door, and I sat right down and signed it. He wouldn't have to step but a couple of feet.

Q. Did Peyser know that you were signing, also, as a witness? A. I do not know whether he did or not.

Q. How long after that did old man Werts leave the office? A. Well, right away. He got up in a very few minutes; he went out, I think; he and Mr. Peyser went out into the front part of the store together.

Q. What directions did Mr. Werts give you regarding the will after it was executed? A. After he had gone out into the front room, I took the will, and asked

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him what I should do with it. He told me to keep it, and read it after he was dead. I asked him if I hadn't better give it to Mr. Bryan, and he said it didn't make any difference, and that I had just as well keep it.

Q. Was Peyser present at this conversation? A. I believe he was in the store; yes, sir.

Here a paper was handed the witness, and he was asked:

Q. Is that the will of Martin Werts, executed at the time referred to by you heretofore in this deposition? A. This the will that I wrote at the request of Martin Werts.

The witness further testified that he made the proof upon which the will was formally admitted to probate; that all the facts stated in the affidavit of proof, except the part thereof wherein it is stated "that he then and there declared his will to be the same as stated in his last will and testament," were true.

Mr. Peyser, the other witness to the will, testified that he was 48 years of age. His residence was Albany, Oregon, and his occupation, trading. That he saw Martin Werts around Tangent, but did not know what his name was. Upon the will being shown to the witness, and he being asked if he recognized the signature, "M. Peyser," and, if so, to state who wrote it, answered: "I wrote it myself." That the way he came to write it, he was at Tangent on business; and Mr. Beard called him to witness a paper, and he did so.

Question. What other signature, if any, did you see attached to the instrument at the time you signed your name? Answer. I saw a name there, but I did not pay any attention to it whatever.

Q. Point out the name you saw on the paper at the time you signed your name there. A. I couldn't do it. I didn't pay no attention to the name.

Q. Was the name you saw at the time you signed your name located toward the right-hand side of the paper you signed, or the left? A. The right side.

Q. State whether J. J. Beard's name was signed to

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that paper as a witness at the time you signed it. A. No, sir.

Q. State what knowledge you had of J. J. Beard signing it after you signed it. A. I have none whatever.

Q. What did J. J. Beard do immediately after you signed it? A. I could not tell what he did. He was present when I signed it as a witness,—was standing right on the side of me. I think he gave me his chair. I believe it was his chair.

Q. Did you see Mr. Beard doing anything before you went out, or while you were going out? and, if so, state what he was doing. A. I didn't take any particular notice. Could not tell whether he took a seat or not, or about the time I left.

Q. Where was Martin Werts at the time you wrote your name to the will? A. There was an old gentleman sitting there in the office. I didn't know his name, as I was not acquainted with the old gentleman at all. I was only acquainted with him by sight. I could not tell the distance he was sitting from me when I wrote my name as a witness to the instrument, but it was not very far. He could see me plainly at the time I signed my name, if his attention had been directed towards me, or if he had wished to see me. He was in the same room with me at the time I signed it.

Q. Where was J. J. Beard at the time he called you to witness the paper? A. He just came out of a little room, where, I believe, the post-office was kept. I was standing in the door or on the porch of the building. I must have been twenty feet or more from the little room.

Q. Give your best judgment how far this old man who was in the room was from J. J. Beard at the time he called you to witness the instrument. A. I could not tell the distance, but Mr. Beard was standing close to me.

Q. Where was Mr. Beard at the time he called you,—how far from the post-office room? A. I could not tell. I didn't take any particular notice. I cannot approximate the distance.

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The witness was here shown a diagram of the ground floor of the building, showing that it was partitioned into three rooms,—a large front room, occupied as a store, and two small rooms, one of which was a bedroom and the other a post-office room, with a doorway between them, and one from the bedroom into the store. The storeroom is about 30 feet in length.

The witness was then asked "where he stood, and where J. J. Beard stood, at the time Beard called him to sign as a witness," to which he answered, in substance, that he stood in the front part of the building, and that Mr. Beard stood somewhere back in the store; that he came out of the post-office room, and was standing near the door which goes from the store into the bedroom; that the old man was in the post-office room when witness went in there after being called by Beard; that he did not see him go into the room; thought he heard some one in the room before he went in, but did not hear anything said which he could understand. It was a human voice, but could not tell whether the party was reading or talking.

Question. What was the condition of the old man's mind at the time you signed the instrument as a witness? Answer. Well, I couldn't tell what his mind was. He looked kind of strange to me—kind of wild look on him.

Q. What did you understand you were signing your name to that instrument for, at the time you signed it? A. Well, I didn't understand anything. They simply called me in to witness the paper, and I made the remark: "You don't want me to sign any money matter, do you?"

Q. What was the extent of your acquaintance with the old man at the time of signing the instrument? A. Not any.

Q. You knew him when you saw him, didn't you? A. I knew him when I saw him in Tangent, but did not know his name. That is all the place, to my recollection, that I saw him.

J. A. McGee testified: "I heard Joe Beard reading

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the will. I don't know where Mr. Peyser was when the will was read. I didn't hear Mr. Werts say anything."

J. A. Sibbetts testified: "I seen Mr. Werts go into the post-office the day the will was written. I seen him at the front door at the time. Some one called Peyser on the inside of the office. Peyser stood opposite the door on the outside. I recognized the voice of the person calling Peyser as that of J. J. Beard. It was simply a request to step into the office. I heard no reading or talking in the back room until Mr. Peyser was called. I heard nothing about writing a will at that time. I was sitting on a chair on the north side of the outside door when Mr. Werts entered the post-office. This was the front door of the post-office building. When Mr. Beard called Mr. Peyser, he, Peyser, was standing about three and one-half feet away, and on a line with the south side of the door. I had been sitting exactly in the same position and place I have described all the time after Mr. Werts went into the post-office up to the time Beard called Peyser. Can't state definitely the length of time Peyser had been on the porch prior to the time he was called by Beard. I only noticed him about fifteen or twenty minutes before he was called. It might have been longer. When Beard called Peyser, it was in just an ordinary business tone."

The foregoing is not literally all the testimony in the case upon the question of the attestation of the instrument, but it the material part thereof; and, unless it establishes the attestation of the alleged will as required by the section of the Code above set out, the proponents of it must fail in their proof of its due execution.

The statute of this State, section 757, Ann. Code, defines what a "subscribing witness" is. He "is one who sees a writing executed or hears it acknowledged, and, at the request of the party, thereupon signs his name as a witness." And I think the word "Attestation," in the absence of any statutory definition, implies the same thing. A subscribing witness to a will, there-

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fore, must be something more than a person who subscribes his name as a witness to it. The testator must either sign the will in the presence of the witness, or must acknowledge to him, by word or act, that he had signed it. It is not necessary that the witness know the contents of the instrument subscribed by him, or its nature or character; but he must be able to testify that the principal in the affair put his name upon the identical piece of paper upon which he placed his own. Harlan Canada's Appeal, from probate, 47 Conn. 450.

Counsel for the proponents, at the hearing, did not question the correctness of the rule as here indicated, but insisted that the facts and circumstances of the transaction authorized the inference that the decedent acknowledged the execution of the instrument. As to the witness Beard, no acknowledgment by the decedent of the execution of the instrument was necessary, as he was personally cognizant of the fact that the decedent signed it by making his mark; but the witness Peyser did not see the signing done, and could not obtain such a knowledge of its having been done as would render him a competent witness to the fact unless, at the time he subscribed the instrument, the decedent in some manner acknowledged its execution. Said counsel lay down the proposition that it is not essential in the execution of a will that the witnesses to it see the testator subscribe the instrument,—that he acknowledges or adopts the signature in their presence is sufficient; that the acknowledgment is not required to be made in any particular words or in any specified manner, but if, by sign, motion, conduct, or attending circumstances, the attesting witness is given to understand that the testator had already subscribed the instrument, it is sufficient acknowledgment. And the counsel cite in support of the proposition the following authorities; *In re Will of Lawrence Convey*, 2 N. W. Rep. 1084; *Raudebaugh* v. *Shelly*, 6 Ohio St. 307, 315; *Haynes* v. *Haynes*, 33 Ohio St. 615; *Nickerson* v. *Buck*, 12 Cush. 342; *Tilden* v. *Tilden*, 13 Gray, 110; Schouler, Wills, §§ 321, 322. This proposition, as a mat-

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ter of law, is undoubtedly correct, and the authorities cited fully support it. The difficulty, however, which the said counsel have to contend with, is in the application of the principle to the facts of this case.

If it appeared from the evidence bearing upon the point involved that the decedent acknowledged or adopted the signature to the instrument as his own in the presence of the witness Peyser, either from the testimony of the latter or from that of any other witness, or that, by any sign, motion, conduct, or attending circumstances, he gave said witness to understand that he had already subscribed the instrument, I should not hesitate to hold, as I am at present advised, that it was a sufficient acknowledgment; but I fail to discover any evidence which would warrant such a conclusion. The evidence shows that the decedent, while the said witness was subscribing his name to the instrument, maintained "mere silence," which "is not enough." *Haynes* v. *Haynes*, *supra*. If the decedent had said to the witness Peyser, "this is my will," or if the witness Beard had said in the presence of the decedent and Peyser: "This is the will of Mr. Werts. He has signed it, and wants you to subscribe your name to it as a witness,"—or used any language of that import, the contention of the proponents' counsel might have been tenable. Under the testimony, however, as it stands, I do not see how, by the most liberal construction of it, Peyser could have been a competent witness to the will. He could not testify that the decedent signed the will. He did not see him sign it, and was not informed by any one, so far as appears from the evidence, that he did sign it, or adopt the signature thereto as his own. The facts in the case of *Nickerson* v. *Buck* and in *Tilden* v. *Tilden*, *Executor*, *supra*, from which the courts, in these respective cases, inferred that the testators to the said wills had acknowledged the execution of the same, were much stronger than in this case; yet I think the courts there, especially in the latter case, extended the doctrine of inferential evidence to its utmost verge. It is not a pleasant duty

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to be compelled to determine that the intention of a party to honestly dispose of his property by will and testament was thwarted by his failure to comply with an apparently technical exactment of the law, but the aim and object of the statute in requiring the observance of certain formalities in the execution of such instruments is entitled to due consideration; otherwise a door to fraud and forgery in the disposition of estates *causa mortis* would be thrown wide open.

Counsel for the proponents strenuously urge that the witnesses to the instrument in question, in giving their testimony as to its execution, exhibited a disposition to suppress the facts regarding it, and insist that the will and testament of a party, honestly made, should not be defeated by the failure of memory of the witnesses nor by their false swearing. The argument, viewed from a moral standpoint, is undoubtedly sound; but I do not see how it can aid the proponents' case herein. They were required to prove the due execution of the will; and, if they have failed in that respect in consequence of the lack of memory or the false swearing of the witnesses, it is the misfortune of those interested in the matter of its proof. If the court believed that the witnesses to the said instrument had wilfully neglected and refused to state under oath all the facts they knew concerning its execution, still it would not be authorized to hold that the instrument was a valid will of the decedent unless there were other evidence in the case showing that it was executed in compliance with the requirements of the statute. The proof of a will should not fail because the testimony of the subscribing witnesses thereto is not sufficient to establish its execution in accordance with the statute, provided it can be proved by other competent evidence to have been so executed; but where such proof is not made the courts of this State have no more authority to adjudge it effective than they would have to attempt to enforce an oral expression of a party regarding the disposition which should be made of his property at his death. Under the view herein expressed, the decree of the cir-

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cuit court must be reversed, and that of the county court affirmed.

LORD, J., dissenting. Peyser is an unwilling witness, of an unreliable character, whose testimony, as disclosed by the record, indicates a purpose to defeat the will. That it ought not be allowed to succeed, if it can be prevented consistently with a proper administration of the law, is admitted. The difficulty lies in determining the sufficiency of his evidence as an attesting witness. The testimony of Beard, the other witness to the execution of the will, is conceded to be competent and sufficient; and the will must stand or fall upon the sufficiency of the testimony of Peyser, in the light of the surrounding facts and circumstances. Briefly the facts are these: The testator sought Beard, and requested him to write his will; and together they went to a small office in the back of a store, where Beard wrote it and the testator signed it. Beard then went to the front door of the store, and asked one Peyser to come into the back office and witness it, but without disclosing to him the nature of the instrument. When Peyser signed it, he saw the signature of the testator to the will, who was sitting quite near to him, and knew the purpose for which Peyser signed it, but he did not declare to Peyser, in words, that it was his signature; nor did Peyser know it, other than from the fact of his presence and acquiescence under the circumstances. When the will was offered for probate, Peyser swore that the instrument and the signature were the same as when he witnessed it, so that as to its identity there is no doubt. But the contention is that Peyser must be able to swear that he knew that it was the signature of the testator either from seeing him write it, or from his acknowledgment by words or acts, and that the testimony of Peyser falls short of this requirement.

It is admitted that the testator is of sound mind, and that the will is the product of his own free agency; nor is it doubted, in view of all the facts in evidence, that it was executed by him as his last will and testament.

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It is clear, from the evidence, that the testator knew what he was doing when he procured Beard to write his will and he himself signed it, and what Peyser was doing when he witnessed it, so that if there is anything in his conduct, under the circumstances, at the time Peyser signed, which amounted to an acknowledgment that the will was executed by him, we ought so to declare, and not allow his last will and testament to be set aside and defeated. Within a little more than an inch from the place on the paper where Peyser signed as a witness was the signature of the testator, which he admits that he saw at that time, and within a few feet of him sat the testator; and no one else except Beard was present. Peyser was there at the instance of Beard, who had called him into the office to witness a document which he saw was already executed; and when he proceeded to witness it, and the testator, knowing the facts, looked on and said nothing, was not his silence, in the light of the facts, an acknowledgment that the will was executed by him?

When I see a man's name to a paper document, and he is present, and no one else except the scrivener, and I am there to witness it, and when I do so he looks on, but says nothing, is not his acquiescense, under the circumstances, an acknowledgment to me that the will and signature are his own? In the light of the facts, Peyser had a right to assume and understand that the will was executed by the testator then present, because his conduct in the premises was declaratory of that act; and, when that assumption is sustained by the undisputed testimony of the other witness, and is inconsistent with any other conclusion to be drawn from the whole evidence, it carries to the mind a declaration or acknowledgment as direct and positive that the testator then present, executed the instrument, as if he had so declared or acknowledged it to him in words.

In determining this question, we are to consider all the facts in evidence relative thereto, and not base our conclusions upon isolated testimony of the witness Peyser; and, when thus viewed, if it is clear from the attend-

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ing circumstances that the testator executed the will, and that Peyser knew it, because, as a reasonable being, the conduct of the testator, under the circumstances, so informed him, it is our duty to hold such facts equivalent to such an acknowledgment, and uphold the will. In *Tilden* v. *Tilden*, 13 Gray, 113, the only difficulty in the case there was, as here, upon the fact of a proper attestation of the witness. The court say: "In reference to this witness, it is said there was no publication of the will by the testator, no actual signing in his presence, no direct acknowledgment that he had signed the paper, and no knowledge on the part of the witness whether the testator's signature was on the paper at that time." And yet the court, upon the evidence, found that the instrument had been duly signed by the testator, and duly attested as his last will and testament. See, also, *Dewey* v. *Dewey*, 1 Metc. 349; *Nickerson* v. *Buck*, 12 Cush. 339; *Haynes* v. *Haynes*, 33 Ohio St. 615; Schouler, Wills, §§ 321, 322.

There is no suggestion that there has been any fraudulent substitution of a false paper or will, nor is there anything in the facts to countenance any such supposition. We are all convinced that the will was executed by the testator, only my associates think that the testimony of Peyser does not fulfil the requirements of the law. To my mind, in view of the facts and circumstances, Peyser could not avoid knowing that the testator, then present, executed the will. The facts so informed him, and authorize the inference that the testator acknowledged the signature of the will to be his act, though he did not expressly so state. In my judgment, then, the facts as disclosed by this record authorize us to find that the instrument was duly signed by the testator, and was duly attested as his last will and testament. It ought, therefore, to be upheld, and his property disposed of according to its direction.

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THYNG *vs.* MOSES.

(65 New Hampshire, 106.)

DISTRIBUTION OF LEGACIES.

Where a definite surplus remains in the hands of the trustee under a will in excess of the amount of certain unpaid legacies, after payment of the balance of the specific legacies and all debts and other charges against the estate, the distribution of such surplus among the residuary legatees will not be delayed because a trust, connected with such unpaid legacies, is not yet performed.

BILL in equity by Thyng, a trustee under the will of Theodore Moses, for construction of the will, and direction as to the distribution of trust funds now in his hands. The will gives to Ann A. Moses, daughter of the testator, "a good and comfortable support during her natural life." It then gives the interest and income of certain specified sums to each of his other seven children for life, the principal in each case to go to the children of his said children *per stirpes*. A residuary clause gives the residue of his estate "to my said children, their heirs and assigns forever." All the children except two, and the defendant, Abby K. Moses—who is the widow of one of the sons, and has by the will, during her life, the interest and income of the same sum as her late husband had—are dead. The legacies to said deceased children and their children, and all debts, special legacies, and other charges against the estate have been paid. The balance of the legacies to the two living children and to the heirs of the husband of Abby K. Moses is $7,179.44. The total amount now in the trustee's hands, mostly in bank-stocks, is (at par) $10,000. The market value is considerably more. The "surplus" now in the trustee's hands is about $3,000 or more, if the stocks are reckoned at market value. The income of this surplus will pay all the expense of said trust, leaving the entire income of said "capital sums" to be paid to the legatees without charge. The question is now raised

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whether said surplus should not be immediately distributed, and, if not, what part, if any, the income thereof should bear of the expense of the trust.

William H. Paine, for trustee.

Marston & Eastman, for life legatees.

C. H. Knight, for residuary legatee.

CLARK, J. The trust was created by the provisions of the will respecting the life legacies and the support of Ann A. Moses. The uncertainty as to the amount which would be required for her support rendered a division of the estate impracticable during her life-time, but her death removed all uncertainty, and, the debts and special legacies being paid, no contingency remains and no reason exists why a distribution of the estate cannot now be made. Ordinarily, the beneficiaries under a will, unless it is otherwise provided, are entitled to their respective shares of the estate as soon as they can be determined, and distribution can reasonably be made, and, unless the contrary appears, it is to be assumed that the testator intended that distribution should be made as soon as practicable. Where a testator by his will bequeaths to his executors several sums of money in trust for different parties, each trust should be kept distinct from the others, so that every step in its management may be distinctly traceable in the accounts of the trustees, and in the investments they make. The trust must not, through investment, be complicated with the rights of strangers, or required to share in the losses of other funds. 1 Perry, Trusts, § 463; *Fowler* v. *Colt*, 25 N. J. Eq. 202; *McCollough* v. *McCollough*, 44 N. J. Eq. 313, 14 Atl. Rep. 123.

The amount of the bequests to the life legatees and their children is a definite sum, ascertained to be $7,179.44. The balance of the estate belongs to the residuary legatees, and the fact that the trust has not

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been fully performed as to the life legatees furnishes no ground for withholding from residuary legatees the shares to which they are entitled. There is nothing in the will indicating that the testator intended that the distribution of the estate should be postponed until after the death of the life legatees, and the balance of the fund above $7,179.44 should be distributed among the residuary legatees.

Decree accordingly.

BIEDLER *vs.* BIEDLER.

(87 Virginia, 300.)

CONSTRUCTION.—ADVANCEMENT.

The presumption arising from the fact that testator specifically devised certain land to his two sons, and then directed the balance of his estate, "not hereinbefore particularly disposed of," to be disposed of as the law directs, is that he thereby intended to equalize the two sons with his other children, to whom he had made previous gifts, and that he did not intend the devise to them should operate by way of an advancement, within the meaning of Code Va. § 2561, which provides that advancements to a descendant, made by one who dies wholly or partially intestate, shall be brought into hotchpot with the whole estate before the person advanced shall be entitled to partition or distribution with the other heirs of decedent.

George R. Calvert, for appellants.

R. S. Parks, for appellees.

HINTON, J. This is an appeal from a decree of the circuit court of Page county. The parties to the controversy are the devisees and legatees of one Morgan Biedler, deceased. The question presented for decision is, to use the language of the appellants' counsel, "whether the third item of the will is, under the law, an advancement, to be brought into *hotchpot* under the fourth item of the will."

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By the first clause of said will, the testator directs that a sale of all his personal property shall be made, and that his debts and funeral expenses shall be paid out of the proceeds thereof. The second, third, and fourth clauses read as follows:

"2. After the payment of my debts and funeral expenses, I desire that the remainder of the proceeds from the sale of the personal parts of my estate be equally divided amongst my children and my wife, Mary Biedler.

3. I give to my two sons, Henry W. Biedler and Morgan L. Biedler, my undivided half-interest in the ridge tract of land known as 'Little Meadows Tract,' now owned by L. C. Koontz and myself, to be enjoyed by them forever.

4. All the rest of my estate, both real and personal, of what nature or kind soever it may be, not hereinbefore particularly disposed of, I desire shall be disposed of as the law directs."

The argument for the appellants is that the devise of the testator's undivided half-interest in the "Little Meadows Tract," in the third clause of his will to his sons, Henry W. Biedler and Morgan L. Biedler, is not a specific devise to them, but an advancement; and that as, in their view, the testator died intestate as to all the property mentioned in the fourth clause, the case falls within the provisions of section 2561, Code 1887, and that the said Henry W. Biedler and Morgan L. Biedler shall be required to bring these advancements into *hotchpot*, if they wish to participate in the distribution of the other estate.

Section 2561 of the Code of Virginia reads thus: "Where any descendant of a person dying intestate as to his estate, *or any part thereof*, shall have received from said estate in his life-time, or *under his will*, any estate, real or personal, by way of advancement, and he, or any descendant of his, shall come into the partition and distribution of the estate with other parceners and distributees, such advancement shall be brought into hotchpot with the whole estate, real and

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personal, descended or distributable, and thereupon such party shall be entitled to his proper portion of the estate, real and personal." Now the doctrine of hotchpot, as Mr. Minor (see 2 Minor, Inst., 3d Ed., p. 506) correctly observes, has been much enlarged in Virginia, not only beyond the scanty limits of the common law, but also beyond the purview of the English statutes of distributions, (22 & 23 Car. II. c. 10, and 29 Car. II. c. 3,) with the intent to bring about, as nearly as may be, an equal division among the *children*, etc., of the decedent, of all of his estate, both real and personal, except so far as, in the *exercise of his right of ownership*, he may have thought fit himself to create a difference. *Chinn* v. *Murray*, 4 Grat. 377. And an examination of the statute shows that, for the law of hotchpot to apply in a given case, these circumstances must concur, namely, the decedent must be intestate as to his estate, or some part thereof, and the descendant of him who desires to share in the division of the other estate must have received from the intestate, in his life-time, or under his will, some estate, real or personal, or both, for the purpose of advancing him in life. *Puryear* v. *Cabell*, 24 Grat. 260.

Now, do all these things concur in this case? Let us see. It is not pretended that Morgan Biedler died without a will, but the appellants insist that inasmuch as he disposes of the property embraced in the fourth clause "as the law directs," that this part of his property will pass according to the law of descents and not by devise, and that as to this portion of his property he died intestate. In other words, invoking the old rule—which since the statute of 3 & 4 Wm. IV. c. 106, § 3, has ceased to have any practical value in England, and many of the reasons for which no longer exist in this country—that where a testator makes the same disposition of his estate as the law would have done if he had been silent, the will, being unnecessary, is void; or, stating it somewhat differently, that, where a title by descent and a title by devise concur in the same individual, the heir is held to be in by de-

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scent, and not by purchase. The appellants first argue that the testator died intestate as to the property embraced in the fourth clause, and then that Henry W. and Morgan L. Biedler must come into hotchpot.

This doctrine, however, that where the devise is to the testator's heir, to take in the same manner as he would take as heir, he must be regarded as taking by descent, and not by purchase, was probably adopted, says Mr. Minor, to prevent a confusion of the title by descent with the title by purchase in feudal times, when such confusion would have affected the tenure of lands, and at a later period would have impaired the interests of creditors, certain of whom could charge with their debts lands descended, but not devised, only applies, according to all the authorities, where the devisee is *sole heir* to the land devised; for, if he is only one of several co-heirs, although the very same share be given him as he would take by descent, he does not take it in the same way, for, as co-heir, he would take it in coparcenary with his fellows; whereas, as devisee, he would take it in severalty if it was devised to him alone, and if devised to him along with others he would take as joint tenant, or tenant in common. In like manner a devise to several co-heirs is not within the doctrine, but is good, because, as devisees, they will take as joint-tenants or tenants in common; whereas, as heirs, they will take as co-parceners. 2 Minor, Inst. p. 1054; 3 Lomax Dig. marg. p. 106; 1 Jarm. Wills, (Rand. & T. Ed.) p. 195; Pow. Dev. 428.

Notwithstanding, therefore, the peculiar language used in this case, no rights of creditors being involved, it might well be questioned whether the testator is to be regarded as having died intestate as to this property, if that question were necessary for a decision of this case. But conceding that there is a partial intestacy, where shall we find the slightest evidence of an indication that the testator intended to advance these two sons? In a case like this, where the testator has left a will, no matter what may be the rule in other cases, no presumption of an intention to advance

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can arise from the mere circumstance of a partial intestacy; for, as was said by Judge BALDWIN in *Chinn* v. *Murray*, 4 Grat. 377, "the reasonable supposition is, when the decedent has made a will, that he has thereby corrected inequalities so far as he desired to do so." And in the present case the language of the will shows to my mind, at least, as plainly as human language can show anything, that such was not the purpose of the testator. The language of the testator is that "as to all the rest of my estate, * * *not hereinbefore particularly disposed of*, I desire," etc. Now, could he have indicated, by the use of so many express words, more plainly than he has done by this language, that his purpose was to prefer those to whom he had made previous gifts, and thus to produce an inequality in the distribution of his property? We think not. To hold otherwise would be, in our judgment, not to execute, but to overturn and disappoint, the manifest intention of the testator.

These views show that the lower court has, in its decree, correctly construed the will of Morgan Biedler, deceased, and the decree appealed from must therefore be affirmed, and the cause must be remanded, to be further proceeded in to final decree.

Decree affirmed.

LACY, J., concurred in result.

HAZLETON *vs.* REED.

(46 Kansas, 73).

REVOCATION.

It may be laid down as a general rule that a written instrument which discloses the intention of the maker respecting the posthumous destination of his property, and which is not to operate until after his death, is testamentary in its character, and not a deed or contract, and may be revoked.

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Error from the district court of Ottowa county; M. B. NICHOLSON, Judge.

Garver & Bond, for plaintiffs in error.

W. E. Richards and *R. R. Rees*, for defendants in error.

HORTON, C. J. This was an action brought in the court below by the widow and minor children of John Hazleton, deceased, against James C. Reed, executor of the last will of Henry Ricket, deceased, and other parties, to enforce an alleged contract for the conveyance of certain real estate executed on the 9th of March, 1883, by John Hazleton and Henry Ricket. Henry Ricket died on the 15th of September, 1883. John Hazleton died on the 9th of April, 1888. Upon the part of the plaintiffs it is claimed that, within the terms of the contract, Ricket was under obligation to make such provisions by deed or will as would vest the title to the land in Hazleton; that the mere method or form adopted for this purpose cannot be held to be material, so that the intention of the parties is carried out; that it is the duty of the court to ascertain the intention of the parties with reference to the subject matter of their agreement, when that can be done; that it was the intention of both Ricket and Hazleton that the land should become the property of the latter upon the former's death; and therefore that the district court erred in sustaining the demurrer of the defendants, upon the ground that the petition did not state sufficient facts to constitute a cause of action. The written memorandum of the alleged contract was under consideration by this court in the case of *Reed* v. *Hazleton*, 37 Kan. 321, 15 Pac. Rep. 177. The facts of this case, together with a copy of the memorandum, are recited in full in the foregoing case, and need not be repeated here. In the former opinion handed down it was said:

"Under the view which we take of this instrument, it will be unnecessary to examine the nature of a con-

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tract of bargain and sale, and a covenant to stand seized to the use of the grantee, which are discussed in the briefs filed in this action. We believe that it ought not to be placed in either of those classes of conveyances. * * * This article of agreement does not contain any of the usual operative words of a conveyance, with the possible exception of this clause: 'After the death of said Henry Ricket, of the first party, the right and title of the land in question shall vest in the said John Hazleton, of the second party.' That provision has no present operation, and could be revoked by the grantor at any time. It was testamentary. * * * The old man wisely kept possession and control of his home, to prepare for the possible change in the feelings of himself and Hazleton. Hazleton was not without recourse if he had performed services for which he had not been paid. He could have presented his claim against the estate, and the courts were open to aid him in obtaining his dues."

This disposes of the case. In *Turner* v. *Scott*, 51 Pa. St. 126, on the 22nd of November, 1849, the father, John Scott, executed an instrument to his son, John W. Scott, purporting to convey his farm. The consideration for the execution of the instrument was the natural love and affection which the father had for his son, and also an agreement from the son that he was to live with the father, assist him in his work on the land, and maintain the mother during her natural life, if she survived her husband. The instrument contained the following provisions:

"Excepting and reserving, nevertheless, the entire use and possession of said premises, unto the said John Scott and his assigns, for and during the term of his natural life; and this conveyance in no way to take effect until after the decease of the said John Scott, the grantor." The son commenced to live with his father upon the land mentioned in the instrument, but after a time they quarrelled. The father turned the son out, and on the 26th of February, 1861, made a will revoking the instrument executed to his son, which had

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been put upon record in the proper county. The chief justice of the court, in construing the written instrument from John Scott to his son, John W. Scott, said:

"We see nothing in the covenant of warranty to change our construction of the operative words of the grant. As these words were expressly limited to take effect only after the death of the grantor, they were necessarily revokable words. The doctrine of the cases is that, whatever the form of the instrument, if it vest no present interest, but only appoints what is to be done after the death of the maker, it is a testamentary instrument. It signifies nothing that the parties meant to make a deed instead of a will. If they have used language which the law holds to be testamentary, their intention is to be gathered from the legal import of the words they have employed, for all parties must be judged by the legal meaning of their words."

In *Leaver* v. *Gauss*, 17 N. W. Rep. 522, (Supreme Court of Iowa), Leaver and wife executed to Gauss an instrument somewhat in the form of a deed, but it was provided therein that it should take effect only after the death of himself and wife. It is claimed that a valuable consideration was paid therefor by Gauss. One of the provisions of the written instrument was "that the grantee is to take no estate during the lives of the grantors." In that case it was held that "a deed which recites, as one of its express provisions, that 'the grantee is to take no estate during the lives of the grantors,' is testamentary in its character, and even if consideration was paid for it, may be revoked; no present estate subject to a life estate being created thereby."

In *Sperber* v. *Balster*, 66 Ga. 317, August Kohler executed a written instrument purporting to convey to Sophestina Sperber 650 acres of land, in consideration of services rendered him by Sophestina as a nurse. The instrument provided "that it should have full effect at his death."

The chief justice of the court said in that case that:

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"It is wholly unnecessary to cite cases or invoke precedents in construing a paper like this, with a view to get at his meaning in respect to the time when he intended title, right, property, to pass out of himself into the object of his bounty. It is enough to lay down the universal principle, embodied in our Code, § 2395, which is in these words: 'No particular form of words is necessary to constitute a will; and in all cases, to determine the character of an instrument, whether it is testamentary or not, the test is the intention of the maker, from the whole instrument, read in the light of the surrounding circumstances. If such intention be to convey a present estate, though the possession be postponed until after his death, the instrument is a deed; if the intention be to convey an interest accruing and having effect only after his death, it is a will.' So reading this instrument, we construe it to be clearly a will; at all events, we all hold that such is the better legal view of it."

In *Kinnebrew* v. *Kinnebrew*, 35 Ala. 628, it was decided that,

"An instrument under seal, in form a deed of gift, by which the grantor, in consideration of the natural love and affection for the grantee, who was his grandson, and the present payment of five dollars by the grantee, conveys to the latter, by the words 'do by these presents give and grant' a slave, 'and fifteen hundred dollars in cash, to be paid to him out of my (grantor's) estate at my death, by my executor or administrator,' *held* a deed of gift as to the slave, but as to the money a purely voluntary executory trust, which a court of equity would not enforce as an instrument *inter vivos*, but which was valid and operative as a will."

On the part of the plaintiff counsel refer with great confidence to the case of *Sutton* v. *Hayden*, 62 Mo. 101. In that case an arrangement was made by Mrs. Green with her brother to take his daughter, her own niece and godchild, and make her her heir at her (Mrs. Green's) death. Subsequently she promised that if the niece would come and live with her (Mrs. Green) and

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would be a daughter to her and nurse and take care of her the remainder of her life, all that she had should be hers (the niece's) at her (Mrs. Green's) death. The niece, Nancy A Sutton, accepted the offer, and, relying upon the promises of her aunt, entered into her services, and continued with her about 15 years. Mrs. Green failed to make any deed or will, and died intestate. In that case the court held that a specific performance of the agreement of Mrs. Green could be compelled in equity, and that case is followed in several other Missouri cases. This case, however, is quite different from them in many particulars, especially in this: That Hazleton did not care for Ricket but a comparatively short time—from the 1st of April, 1882, until the 15th of September, 1883, when Ricket died. By the express provisions of the articles of agreement, Ricket was to retain during his life-time full and peaceable possession of all the land, and Hazleton was to live with Ricket—not Ricket with Hazleton—and Hazleton was to have no right or title in the land until after the death of Ricket. The provision in the article of agreement concerning the land in dispute was held by us in the former opinion to be testamentary only. We adhere to this ruling.

"It may be laid down as a general rule that an instrument in the form of a deed, signed, sealed, and delivered as such, if it discloses the intention of the maker respecting the posthumous destination of his property and is not to operate, until after his death, is a will, and not a deed." 19 Cent. Law J. 47.

The difference between the cases cited in the former opinion and the case of *Sutton* v. *Hayden*, *supra*, and other similar cases, is this: that in the former cases the courts seem to think that the grantees could have recovered for any claim or service which they could establish, without seeking relief in a court of equity; in the latter cases the courts evidently proceeded upon the theory that the law furnishes no standard whereby the value of such services can be estimated, and equity can only make an approximation in that direc-

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tion by decreeing the specific execution of the contract.

In the *Sutton* v. *Hayden* case the niece gave for many years to the discharge of her manifold cares, down to the period of her aunt's death, an unhesitating and unwearied tenderness and attention, which are only bestowed where affection prompts them.

In *Barkworth* v. *Young*, 4 Drew, 1, A., on the marriage of his daughter with B., agreed to leave his daughter an equal portion with his other children. Of course, in such a case, no compensation could be agreed upon or established, and equity alone could afford relief.

In *Rhodes* v. *Rhodes*, 3 Sandf. ch. 279, the services therein contracted for could not and were not intended to be compensated with money, and were also incapable of computation by any pecuniary standard.

In this case the services of Hazleton with Ricket were so brief, being only for about 18 months, that the value of the same could easily be computed.

The judgment of the district court will be affirmed.

All the justices concurring.

ADDITON *vs.* SMITH.

(83 Maine, 551).

ANNUITIES TO WIDOW.

Where a testator gives annuities to his widow and niece as general legacies, each being a simple bequest,— an absolute gift of a definite quantity,—there is a presumption of intended equality, unless the will contains unequivocal evidence of an intention to give a preference.

This rule applied to a case where the annuity given to the widow was in addition to her dower, and that to the niece by a codicil exhibiting a thoughtful solicitude for her condition; the testator providing that, by the payment of the taxes, insurance, and repairs of his homestead, "None of the gifts or bequests or rights to my said wife, and to my said niece, shall be impaired or diminished;" and finally pro-

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viding that "it shall be the duty of my said executors to so dispose of and invest my estate that there shall be, from year to year, a sufficient income to meet all said legacies and bequests."

A demonstrative legacy has a prior right to payment out of the fund charged, but is payable, at all events, out of the principal of the estate, if the fund proves inadequate.

REPORT from superior court, Penobscot county. Bill in equity, heard on bill and answers, brought by B. C. Additon, trustee, to obtain the construction of the will and codicils of Jacob C. Smith, late of Bangor, deceased.

E. Walker, for Harriet N. Smith.

H. C. Goodenow, for Addie Hill.

WHITEHOUSE, J. By the provisions of his will and codicils Jacob C. Smith gave to his wife, Harriet N. Smith, the use of the homestead and furniture, and an annuity of $500, during her widowhood, in addition to her right of dower in his real estate; to his niece, Addie Hill, an annuity of $100; and to his adopted daughter, Emma Smith Cushing, and her heirs, the residue and remainder.

The will was dated April 27, 1876, and the last codicil, February 21, 1877. The testator died March 30, 1878, and in December following the estate was inventoried as follows: Real estate, $7,900; goods and chattels, $564.50; rights and credits, $8,483.93; total, $16,948.53. At the date of the complainant's bill the widow had received in the aggregate $3,600, being $300 a year for 12 years, on account of her annuity, while the niece, Addie Hill, had received but $50 in the aggregate, being two payments of $25 each in the year 1878. It now appears that by reason of *devastavit* on the part of a former representative of the estate, and from other causes, the entire property in the hands of this complainant as trustee under the will is as follows: homestead, $2,500; undivided Grant store, $800; land, $450; furniture for widow, $164.50; rights and credits, estimated, $5,300. It further appears that the

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income from the estate, available for that purpose under the terms of the will, is not sufficient to pay the annuity to the widow irrespective of that bequeathed to Addie Hill. The trustee, therefore, seeks by his bill to obtain a judicial construction of the will and codicils, and to have the rights of the legatees determined and declared, propounding two questions, as follows:

(1) Whether, under said will and codicils, annuities therein specified, or any of them, are an absolute charge on the estate of said testate, regardless of the income.

(2) What are the respective rights of the legatees under the provisions of said will and codicils?

It is elementary law that all codicils or "little wills," being but expositions of the testator's after-thoughts, are to be regarded as parts of the original will, and together with the will are to be construed as one instrument. They should be so interpreted as to harmonize with the leading purpose declared in the body of the will whenever this can be done without a violation of established rules; but when a clause in the will and one in the codicil are entirely inconsistent, and both cannot be executed, the latter clause must prevail Redf. Wills, 1,* 287; *Pickering* v. *Langdon*, 22 Me. 413.

In the cardinal rules of testamentary construction it is also constantly affirmed by courts and text-writers to be of fundamental importance that the obvious intention of the testator, as expressed by the words of the will itself, shall be allowed to prevail unless some principle of sound policy is thereby violated; that this intention shall be collected from the whole will taken together, all its parts being construed in relation to each other so as to form, if possible, one consistent whole, every word receiving its natural and common meaning; but where several parts are absolutely irreconcilable the latter must prevail; and that while the language of the will is thus to be deemed the primary source from which the testator's intention is to be gathered, and this is not to be controlled by mere conjectures based on considerations respecting the condition of his property or the objects of his bounty, still these

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extrinsic circumstances are admissible in aid of the construction of wills to the extent of explaining doubts or removing uncertainties, when with that aid the intent is clear. 2 Jarm. Wills, p. 762, and rules 7 and 10; 1 Redf. Wills, *429-432, and authorities cited; Schouler, Wills, § 466; *Shaw* v. *Hussey*, 41 Me. 495; *Emery* v. *Batchelder*, 78 Me. 233, 3 Atl. Rep. 733. But while these general principles declared by the experience of courts to be helpful in the majority of cases are not to be lightly disregarded, they are not to be blindly followed as inflexible and conclusive rules in each particular case. They are to be employed as servants, and not accepted as masters. *Small* v. *Allen*, 8 Term R. 497.

It is ably and ingeniously argued, in the *first* place, that the annuity to the widow should have priority over that to the neice, Addie Hill; and, *secondly*, it is contended that the widow should receive the full amount of her annuity each year, although it is conceded to be necessary to entrench upon the *corpus* of the estate to supply the deficiency.

1. It is important to observe that this annuity to the widow is not a testamentary gift founded upon a valuable consideration, such as the relinquishment of the widow's right of dower in her husband's estate. In such case it is a familiar and well-settled rule that she does not take strictly as a beneficiary, but as a purchaser for a valuable consideration, and hence her gift will have a preference over all other unpreferred legacies. 2 Redf. Wills, 452-454; *Towle* v. *Swasey*, 106 Mass. 100; *Moore* v. *Alden*, 80 Me. 301, 14 Atl. Rep. 199. But here the annuity was not given or accepted in lieu of dower. On the contrary, in the original will it is expressly declared to be in addition to her dower. The first codicil gives her the use and income of the entire homestead through her widowhood, and the second codicil, after increasing her annuity from $300 to $500, carefully provides that this additional bequest "shall not take away any of the gifts, bequests, or rights given to her under my said last will and first codicil." She is entitled to her dower as well as to the provisions made

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for her in the will, because in the words of the statute, chapter 103, § 10, "it appears by the will that the testator plainly so intended." True, by accepting the provisions of the will, she relinquished the privilege of applying to the probate court for an allowance, but she surrendered no fixed and absolute interest in the estate in exchange for the annuity, and cannot be deemed to have received it in the character of a purchaser.

An annuity given by a will is a legacy charged on the whole estate not specifically devised. 2 Williams, Ex'rs, 1051. The annuities to the widow and niece are in the nature of general legacies; neither of them amounts to a bequest of any particular portion of, or article belonging to, the personal estate of the testator. Each is a simple bequest of an annuity; an absolute gift of a definite quantity. And the general rule is that, among legacies in their nature general, there is no preference of payment, and the burden is on the party seeking priority to make out clearly and conclusively that such priority was intended. 2 Williams, Ex'rs 1364; *Miller* v. *Huddlestone*, 3 Macn. & G. 513; 2 Redf. Wills, 454. In the absence of clear proof to the contrary, the testator must be deemed to have acted on the belief that his estate would be sufficient to answer the purposes to which he devotes it. If the chances of deficiency are anticipated and provided for by the terms of the will, then the directions of the testator must govern, *Towle* v. *Swasey*, *supra*, "but in the common case of a direction in the will of a testator to pay several pecuniary legacies out of his estate," says Chancellor WALWORTH, "the presumption is that the testator intended that all the legacies should be paid equally. Such presumption of intended equality will not be repelled by any ambiguous expressions in the will, but must be allowed to prevail, unless the will contains unequivocal evidence of the testator's intention to give some of the legatees a preference in case the fund should be found insufficient to pay all." *Shepherd* v. *Guernsey*, 9 Paige, 357. See, also, 1Rop. Leg. 421-425; *Emery* v. *Batchelder*, *supra*.

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It is not questioned that by the terms of the original will the widow's annuity had priority over the "residue and remainder" given to Mrs. Cushing. The name of the niece Addie Hill is not there mentioned. But during the succeeding eight months a thoughtful solicitude respecting the condition of Addie Hill, awakened by causes of which we have no knowledge, prevailed with the testator to make her an object of his care and bounty. Thereupon, in the first codicil, after giving to the widow, in addition to the annuity given in the will, the use and income of the homestead and furniture, he proceeds in the second clause as follows: "I hereby give and bequeath to my niece Addie Hill * * * the sum of one hundred dollars per annum during her natural life, to be paid to her by the executors of my said will in installments of fifty dollars every six months after my decease and during her natural life; and it is my will, and said executors are hereby directed, to invest immediately after my decease a sum sufficient to yield an annual income of one hundred dollars, which investment shall be so made that the said semi-annual interest of fifty dollars shall be paid to said Addie Hill at the end of every six months during her natural life; the same *so* to be invested from that part of my estate which would have gone to Emma Smith Cushing, had not this codicil to my said will been made, that at the decease of said Addie Hill the sum so invested for her benefit shall then be disposed of according to the terms of my said will."

All the provisions of the will and codicils, viewed in the light of the probable condition of his property, clearly indicate that the testator had no doubt whatever that his estate would be amply sufficient to respond to these two annuities, with a residue for Mrs. Cushing. The chances of a deficiency are not anticipated or provided for by the terms of the will. He accompanies the bequest to the niece with explicit directions to his executors "to invest immediately after my decease, a sum sufficient to yield an annual income of one hundred dollars." True, he adds that the sum was so

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to be invested from the portion which would have gone to Mrs. Cushing that, at the decease of Addie Hill, it should be disposed of according to the terms of the will. This was obviously designed to reaffirm the provisions of the will in favor of Mrs. Cushing, as modified by the codicil. By the will she was to have the residue and remainder subject to the bequest to the widow. By the will and codicil she is only to have the residue subject to both annuities. The clause in the codicil giving the annuity to Addie Hill is to be examined in connection with the original will, and construed as it would have been if inserted between the first and second items of the will. Its relative force and effect would then be readily apprehended. The testator carves two annuities from his estate, one for his wife and one for his niece, and then gives the residue to the adopted daughter, Emma Smith Cushing, and her heirs. This is the effect of all the clauses taken together.

The provisions of the second codicil are strongly confirmatory of this view. After increasing the widow's annuity from $300 to $500, the testator declares "that this additional bequest shall not take away any of the gifts, bequests, or rights given to her under said last will and first codicil." He then provides that the cost of insurance, taxes and repairs on the homestead shall be paid from the income of his estate, but that "by the payment of the same none of the gifts or bequests or rights to my said wife and to my said niece, Addie Hill, shall be impaired or diminished." Finally he provides that "it shall be the duty of my said executors to so dispose of and invest my estate that there shall from year to year be sufficient income to meet all said legacies and bequests."

"The presumption of intended equality" between the two legatees in question is not overcome by "unequivocal evidence of the testator's intention to give a preference"; on the contrary, there is clearly discernible through the language of the codicils a positive intention to place the two annuities upon that equality in which "equity delighteth."

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2. Are the annuities to the widow and niece made an absolute charge on the estate or dependent for payment exclusively upon the income?

The general rule is that, after certain legacies are given without any express provision of means of payment, a residuary gift, blending the real and personal property of the testator, creates a charge of the legacies upon the entire estate, the word "residue" implying that such payments are first to be made. 3 Jarm. Wills, 426, 427; *Reynolds* v. *Reynolds*, 16 N. Y. 257, and authorities cited; *Taylor* v. *Dodd*, 58 N. Y. 375. It is manifest that, by the terms of the original will, the annuity of the widow under the above rule was a charge upon the whole estate; but it is claimed that the language of the codicils indicates an intention to restrict the payments to the income of the property.

It is not controverted that, if there is a simple bequest of an annuity, whatever the income of the testator's property may be, the annuity must be paid in full to the last dollar of the property; but the provisions of the will, as to the payment of the annuity, may be such as to show an intention on the part of the testator that the annuity shall only come out of the income of the fund or estate, and not out of the *corpus* or capital. 2 Williams, Ex'rs 1360.

In *Croly* v. *Weld*, 3 De Gex, M. & G. 995, the income was insufficient to pay the annuity and all legacies named in the will, and, in holding that the annuity was payable out of the capital, BRUCE, V. C., says: "The question may be put thus, does the subsequent language show a clear intention otherwise? for, if a clear intention be shown in an earlier part of the will, that can only be displaced or changed by an intention equally clear in another part. If there is anything in the rest of the will derogating from an intention to be collected from the words of this will, it does no more than create a doubt, and the doubt is not sufficient to prevail against the clear effect that would have to be given to the words of the gift standing alone." In *Baker* v. *Baker*, 7 De Gex, M. & G. 681, the assets proved

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insufficient to provide a capital sum which would yield a clear annual income of £200 given by the will, and it was held that the widow was entitled to have the amount paid in full out of the capital.

The predominant idea of the cases seems to be that, where the testator bequeaths a sum of money, or, which is the same thing, a life annuity, in such a manner as to show a fixed and independent intention that the money shall be paid to the legatee at all events, that intention will not be permitted to be overruled merely by the direction in the will that the money is to be raised in a particular way or out of a particular fund, such direction being a secondary thought. *Pierpont* v. *Edwards*, 25 N. Y. 128; *Mann* v. *Copland*, 2 Mad. 223. If it be manifest that there was such intent separate and distinct from the property designated as the source of payment, the legacy will be deemed general or demonstrative, though accompanied by a direction to pay it out of a particular estate. *Walls* v. *Stewart*, 16 Pa. St. 280. In *Smith* v. *Fellows*, 131 Mass. 20, the testator gave to his widow an annuity of $1,000, during life, to be paid from the income of all his property, and the court says: "The annuity given to the wife was no more a specific legacy than a legacy charged generally upon real estate. It is rather in the nature of a demonstrative legacy, which has a prior right to payment out of the fund charged; but is payable at all events out of the principal of the estate, if the fund proves inadequate." In *Moore* v. *Alden*, 80 Me. 301, 14 Atl. Rep. 199, the annuity was made payable "from the earnings of my individual and partnership property," and it was held that the full annuity should be paid to her until the estate was exhausted. In the opinion the chief justice says: "The gift is unconditional and absolute, although, as is often the case, he overestimates the sources of supply which were to assure its payment. The sources indicated turning out to be insufficient, others must be taken to supply the deficiency."

In the light of these principles and authorities, it

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is the opinion of the court that the testator's directions respecting the investment of his estate, and his allusions to income as a source of payment, are not sufficient to overcome his clearly expressed desire and purpose to make definite provision for the support of the two annuitants by bestowing upon each the gift of a fixed sum to be paid semi-annually during the widowhood of the one and the natural life of the other. The conclusion, therefore, is that the annuities bequeathed to Harriet N. Smith and Addie Hill, standing on a basis of equality in relation to each other and to the estate, must be held a charge upon the entire property; that they are not contingent upon the sufficiency of the income, but, if that proves inadequate, they are payable at all events out of the entire principal available under the terms of the will; suffering proportional abatement, however, whenever there are not available funds sufficient to make full payments.

Decree accordingly.

PETERS, C. J., WALTON, VIRGIN, LIBBEY and HASKELL, JJ., concurred.

GARDNER *vs.* GARDINER.

(65 New Hampshire, 230.)

ALTERATION.—REVOCATION.

A testatrix erased the word "fourteenth" in her will, and interlined the word "twelfth," so as to increase smaller devises to larger ones; but the erasure did not render the word illegible. *Held*, that such action was an attempt to make a new disposition of the property, which was inoperative under Gen. Laws N. H. c. 193, § 6, requiring all changes which in any way affect a will to be attested and subscribed, in the testator's presence, by three or more credible witnesses; and, there being no apparent intention to revoke except by way of the attempted alteration, and the word erased not having

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been obliterated, the word "fourteenth" remained as a part of the will.

In such case, the word "fourteenth" not having been obliterated, there was no revocation within the meaning of Gen. Laws N. H. c. 193, § 14, which provides that "no will or clause thereof shall be revoked unless by some other valid will or codicil, or by some writing executed in the same manner, or by canceling, tearing, obliterating, or otherwise destroying the same."

The clause containing the erasure and interlineation originally mentioned nine devisees, but the names of two of them were canceled by drawing a light pencil mark through them. In the succeeding clause, disposing of the remaining five-fourteenths, the word, "fourteenth" remained unchanged, and the will contained no residuary clause. *Held*, that the cancellation was conditional, and made with a view to the attempted change of disposition, which, having failed, the legacies remained.

APPEAL from probate court, Rockingham county. Elizabeth D. Cutler died July 21st, 1888, leaving a will upon which certain erasures and an interlineation agreed to have been made by her appeared. The material portion of the third clause of the will, in which the alterations appeared, as originally written, was as follows: "All the estate of which I shall die seized and possessed * * * I give, devise and bequeath in manner following: One undivided fourteenth part thereof to each of the following persons, to wit, Edward L. B. Gardiner, Susan I. Gardiner, both of Passaic, New Jersey, children of my nephew, George A. Gardiner," and seven other persons who are named and described—thus making a disposition of nine-fourteenths. Further on in the same clause she says: "The remaining five-fourteenths of my estate * * * I give," etc.,—making a disposition of that fraction, and no more; and the will contains no residuary clause. The erasures and interlineations were as follows: A light line was drawn with a pencil through the word "fourteenth" in the first quotation above, and the word "twelfth" written above it with a pencil. Then the following words were erased by a light pencil mark drawn through them: "Edward L. B. Gardiner, Susan I. Gardiner, both of Passaic, New Jersey, children of my nephew, George A. Gardiner." The will came up

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for probate in solemn form, November 12th, 1888; and the judge of probate thereupon entered a decree approving and allowing it, to which decree was added the following: "And whereas the said Elizabeth D. Cutler, after making said will, made certain erasures and interlineations in the same, it is adjudged and decreed that the word 'twelfth' interlined is not, in law, part of said will, not having been inserted in the presence of three witnesses, as required by law, and that the word 'fourteenth' erased, for which said word 'twelfth' was substituted, is a part of said will, and the following words erased, namely, 'Edward L. B. Gardiner, Susan I. Gardiner, both of Passaic, N. J., children of my nephew, George A. Gardiner,' are not, in law, a part of said will, said words having been erased with the intention on the part of the said Elizabeth D. Cutler to revoke the legacies of said persons whose names are erased, and that said instrument be proved and allowed as the last will and testament of Elizabeth D. Cutler, and so be recorded in accordance with this decree,"—from which this appeal was taken by Edward L. B. Gardiner and Susan I. Gardiner.

Frink & Batchelder, for appellants.

Marston & Eastman and *Wiggin & Fernald*, for executor.

BLODGETT, J. The statute of wills provides that "no will shall be effectual to pass any real or personal estate, or to change or in any way affect the same, unless made by a person of the age of twenty-one years, of sound mind in writing, signed and sealed by the testator, or by some person in his presence, and by his express direction, and attested and subscribed in his presence by three or more credible witnesses," and that "no will or clause thereof shall be revoked unless by some other valid will or codicil, or by some writing executed in the same manner, or by canceling, tearing, obliterating, or otherwise destroying the same, by the

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testator, or by some person by his consent and in his presence." Gen. Laws, c. 193, §§ 614. The mode of revoking a will is, therefore, as definitely prescribed by the statute as the mode of making it; and no essential part of the one can be dispensed with any more than the other.

The first question for adjudication presented by this case arises from the attempt of the testatrix to increase a smaller devise to a larger one by substituting "twelfth" for fourteenth, by interlineation and erasure. While in one sense, this was a revocation by the testatrix of what she had previously done, in the true sense it was an alteration. To revoke a testamentary disposition is to annul it, so that, in legal contemplation, it ceases to exist, and becomes as inoperative as if it had never been written. But when, by the substitution of certain words for others a different meaning is imparted, there is not a mere revocation. There is something more than the destruction of that which has been antecedently done. There is a transmutation, by which a new clause is created. There is another and a different testamentary disposition, which, to have validity, must be authenticated by the observance of the statutory requirements. *Eschbach* v. *Collins* 61 Md. 478. 48 Am. Rep. 123.

It follows that the failure of the testatrix to execute her purpose in the manner prescribed by the statute (section 6) prevented it from going into effect as a testamentary disposition; and, as it is apparent that she had no intent to revoke except by way of alteration, and the word erased not having been so obliterated as to be illegible, there was no revocation, and the will remained intact as before. *Jackson* v. *Holloway*, 7 Johns. 394; *McPherson* v. *Clark*, 3 Bradf. 92; *Quinn* v. *Quinn*, 1 Thomp. & C. 437; *Wolf* v. *Bollinger*, 62 Ill. 368; *Wright* v. *Wright*, 5 Ind. 389; *Penniman's Appeal*, 20 Minn. 245, 18 Am. Rep. 368; *Stover* v. *Kendall*, 1 Cold. 557; *Bethell* v. *Moore*, 2 Dev. & B. 316; *Wheeler* v. *Bent*, 7 Pick. 61; *Short* v. *Smith*, 4 East, 418; *Kirke* v. *Kirke*, 4 Russ. 435; *Martins* v. *Gardiner*, 8 Sim. 73;

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Locke v. *James*, 11 M. & W., 901, 2 Amer. Lead. Cas. (5th Ed.) 501; 1 Redf. Wills, 325, 326; *Eschbach* v. *Collins*, *supra*; *Pringle* v. *McPherson*, 2 Brev. 279. In other words, the effect of the alteration is the same as it would have been had it been made by a codicil imperfectly executed.

The remaining question is as to the effect upon the appellants of the cancellation of their names from the list of legatees named in the first clause of the third article of the will. The appellants contend that it had no effect, while the executor contends that it effected a revocation.

We think the contention of the appellants must be sustained. Canceling and obliterating have always been considered peculiarly equivocal acts of revocation, (*Dan* v. *Brown*, 4 Cow. 490; *Smith* v. *Cunningham*, 1 Addams, Ecc. 455); and eminent authorities hold that where a pencil, instead of pen, is used, the cancellation is *prima facie* deliberative, and not final, (1 Jarm. Wills, 5th Amer. Ed., 291; 2 Greenl. Ev. § 681, and cases cited.) If this be so, it is decisive of the contention, because no collateral evidence is presented which rebuts the presumption. On the contrary, the lightness of the pencil lines, and the failure to change "fourteenths" to "twelfths" in the succeeding clause, tend strongly to show that the act of the testatrix was conditional merely.

But it is not necessary to invoke the doctrine of Jarman and of Greenleaf. There are other and more satisfactory reasons which lead to the same result. The competency of a testator to make revocation of a devise by the simple erasure or cancellation of the name of the devisee is undoubted; but when the act of cancellation is not a substantive, independent act, but is connected with and dependent upon another, and both form but one transaction, the entire design and purpose must be considered, in order to ascertain whether a revocation has been accomplished. When this is done in the case before us, it is at once apparent that the cancellation in question must be considered

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in connection with the preceding erasure and interlineation, and may properly be treated as relative or dependent thereon, because all the evidence indicates that the only purpose of the testatrix was to make a new disposition as to a portion of her property. There is no reason whatever to suppose that she would have revoked the legacies to the appellants if she had been aware that the proposed disposition could not be carried into effect; but, on the other hand, the fair presumption is that her wishes with regard to her property, as originally expressed, would have remained unchanged, in the absence of any known reason for changing them. And this presumption is further strengthened by the fact that otherwise there would be an intestacy as to the two-fourteenths of the estate bequeathed to the appellants; for there is no residuary clause into which it can properly fall, or into which the testatrix intended it should fall. It is clear that the testatrix did not contemplate an intestacy as to any part of her estate. She evidently intended to make a testamentary disposition of the whole of it; and, upon well-settled principles, her intention may be effectuated. "When a portion of a will is cancelled with a view to a new disposition of the property, and the proposed disposition fails to be carried into effect, the presumption in favor of the canceling will be repelled, and the will will stand as originally framed." *Penniman's Appeal*, 2 Amer. Lead. Cas. 501; *Short* v. *Smith*, *Bethell* v. *Moore*, *McPherson* v. *Clark*, *Wolf* v. *Bollinger*, and *Eschbach* v. *Collins*, *supra*.

We are, therefore, of opinion, and without regard to the presumption arising from the manner of its performance, that, as the cancellation was not done with intent to revoke the bequests to the appellants, simply, but with intent to make a new disposition of a portion of the testatrix's estate, which failed of accomplishment, the canceling, which was done only in the view of, and in order to effect, that object, should be esteemed for nothing, and be considered as not having been done absolutely, but only conditionally, and upon the

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proposed disposition being made effectual. To give it effect, under the circumstances, would not only be against the authorities, but would thwart the actual intention of the testatrix, and make her intestate as to one-seventh of her estate, when a contrary intent is plainly manifest in her will. *Wolf* v. *Bollinger*, *supra*.

The decree of the probate court upon this branch of the case is reversed.

Appeal sustained.

BINGHAM, J., did not sit; the others concurred.

LINCOLN *vs.* PERRY.

(149 Massachusetts, 368.)

CONSTRUCTION.—TECHNICAL TERMS.—LEX DOMICILII.—STATUTORY CHANGES.—"HEIRS-AT-LAW."—HUSBAND AS "HEIR."

A gift-over to the "heirs at law" of the first legatee, is to be construed with respect to personal property, not according to the law of the legatee's residence, but by the law of the testator's domicile, as it may have been changed by statute at the time of the legatee's death.

REPORT from the Supreme Judicial Court of Suffolk County.

E. G. McInness, for the plaintiff, read the papers in the case.

H. G. Parker, for the heirs-at-law of Benjamin F. Perry.

J. B. Richardson, for the blood relatives of Judith E. Perry.

C. ALLEN, J. The material portions of the residuary clause of the testator's will are as follows: "All the remainder and residue of my estate, real, personal, and

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mixed, of which I may die seized or possessed, or to which I may be entitled at the time of my decease, shall be divided into four equal parts, which I give, devise, and bequeath as follows, to wit: one of said parts to my brother, Benjamin F. Perry, to have and to hold the same to him during his life, and at his decease to his heirs-at-law, and their heirs and assigns, forever; another of said parts unto Judith Perry, the wife of said Benjamin F. Perry, to have and to hold the same to her during her life, and at her decease to her heirs-at-law, and their heirs and assigns, forever." The testator's birth-place was in Keene, New Hampshire, where he resided in his youth, and in which place at the time of the execution of his will he owned two pieces of real estate, which he retained and owned at his death, but he was domiciled in Malden, Massachusetts, where his will was executed, and thenceforth until he died. The testator died April 24, 1877, and his will was dated October 10, 1874. Judith Perry died at Troy, New Hampshire, January 24, 1884, where for over 30 years immediately preceding her death she and her husband, Benjamin F. Perry, were domiciled and lived together as husband and wife. The property given by the residuary clause consisted of personal property only, in this State, and a piece of land in said Keene, which the testator owned at the time of the execution of the will, and ever after until his death. Upon these and the other facts reported the question is, Upon the death of Judith Perry, who became entitled to the fourth part of the property given in the residuary clause which she enjoyed the benefit of during her life? In other words, Who are to be deemed her heirs-at-law within the meaning of the will?

These questions, so far as we are called upon to deal with them, relate only to the disposition which the trustee is to make of the personal estate given by the residuary devise. There was no real estate in Massachusetts which was included in the residuary devise. The plaintiff having been appointed trustee in New Hampshire for the purpose of selling the land there situated, and

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having made sale of it accordingly, will account for his disposition of the proceeds of such sale in the courts of that State.

A majority of the court has arrived at the following conclusions in reference to the disposition of the personal property over which we have jurisdiction.

1. The testator has appointed a common destination for all of said fourth part of the residue of his property, whether the same is real or personal. The words should not be construed to mean that the real estate should go to one set of persons, and the personal estate to another; but the whole residue must go to the heirs, according to the meaning which that word bears at common law, namely, those who would be entitled to succeed to real estate in case of intestacy. *Fabens* v. *Fabens*, 141 Mass. 395, 399, 400, 5 N. E. Rep. 650.

2. The persons who would be entitled to succeed to real estate in case of intestacy must be ascertained and determined according to the laws of Massachusetts. It has been argued that the word "heirs-at-law" should be held to mean those who would be the actual heirs of Judith upon her decease, this being determined by the place of her residence, and that, therefore, the determination who should take as her heirs should be made according to the laws of New Hampshire. But the question, after all, is, what is the meaning of the testator's words? and we are brought to the conclusion that the true meaning is to designate a set of persons who were to take the estate upon Judith's death, and that those persons are styled her heirs-at-law. This set of persons would not fluctuate with any changes of residence that she might make. The testator would probably not be familiar with the laws in different States. He lived here, his will was drawn here, by a Massachusetts lawyer, and it was executed here. The laws of Massachusetts are those with which presumably he would be best acquainted. The fact that he formerly lived in New Hampshire is immaterial. It is not disclosed how long he had lived in Massachusetts, nor is it necessary to go into an inquiry upon that subject. Under the cir-

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cumstances stated, we must read his will as the will of a person settled and established in Massachusetts. In speaking of heirs-at-law, he probably meant those who would be heirs-at-law here. It is true that in point of fact no land in Massachusetts was included in the residuary devise, but the devise was broad enough in its terms to include such land if by purchase or otherwise the testator had afterwards become possessed of any. The ascertainment of the persons who were to take, under the description of the heirs-at-law of Judith Perry, did not depend upon the circumstance of where land of the testator embraced within the residuary clause might be situated. The will makes no mention of the residence of Benjamin F. Perry, or of Judith Perry, nor of the situation of the land which the testator had in mind as likely to pass by the residuary devise. In four different instances the testator gives a remainder after a life estate to heirs-at-law,—in one instance, to his own heirs-at-law. In the last instance, at least, since a will is held to speak from the time of the testator's death, he must be supposed to have meant those persons who would be his heirs-at-law according to the laws of Massachusetts. Ascertain the persons, and it would be the same as if they had been named in the will; and, while it must be admitted that this solution of the question is not free from doubt, we think the heirs of Judith Perry must be ascertained the same way. *Merrill* v. *Preston*, 135 Mass. 451, 456; *Sewall* v. *Wilmer*, 132 Mass. 131, 136.

3. Under the decision in *Lavery* v. *Egan*, 143 Mass. 389, 9 N. E. Rep. 747, the husband of Judith Perry must be considered as her heir to an amount not exceeding $5,000 in value. The statute giving him this right was passed after the death of the testator, St. 1880, c. 211, § 1. But the testator, in providing that at the decease of Judith Perry the portion of the residue which she had held for her life should go to her heirs-at-law, must be held to have meant her heirs-at-law as ascertained by the laws in force at her decease. Until then it could not be determined who her heirs would be.

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4. Testimony to show that the testator did not wish to have Judith's husband receive anything under the devise to her heirs-at-law was incompetent. *Tucker* v. *Seaman's Aid Society*, 7 Metc. 188; *Osborne* v. *Varney*, 7 Metc. 301; *Amer. Bible Society* v. *Pratt*, 9 Allen, 109. At the time the will was drawn he would not have been included under that designation. His right arises from the subsequent change in the statutes, and the testator must be held to have been content to take this chance, since he did not in terms provide aginst it.

Ordered accordingly.

Statute of Distribution—When Husband is Heir of the Wife.—In Gwynne v. Muddock, 14 Ves. 488, the following provision of a will was construed:—"I commend my soul to God my Saviour and my body to the grave to be buried by my executor Ann Williams, my daughter-in-law, whom I appoint my sole executor to have and enjoy all my real and personal estate all the goods, cattle, chattels, cows and oxen, horses, sheep, corn both in haggard and sown, together with the implements of husbandry and all the household goods and money now in hand and in bonds during her life, but not to diminish nor commit waste on the lands by lessening none nor part, and my nighest heir-at-law to enjoy the same after her death."

SIR WILLIAM GRANT, M. R., held that the testator had appointed his daughter-in-law his sole executrix, to have and enjoy all his real and personal estate during her life, but not to diminish nor commit waste on the lands, and that his heir-at-law was the remainderman and that the daughter-in-law took an estate for life only in the whole, both real and personal estate.

In the majority of States in the United States the descent of real and personal property is to the same persons and in the same proportions, and the regulation of it is in substance as the English Statute of Distributions, with the exception of a widow, who is entitled for life to one-third of the real estate as dower. Such a uniform rule in the descent of real and personal property gives simplicity and symmetry to the whole doctrine of descent, and supersedes many of the perplexing questions which grew out of this doctrine in England. See 2 Kent's Com. 426, 427, 428; Lowndes v. Stone, 4 Ves. 649, and the learned note appended thereto, by Charles Sumner, Esq., in the edition of Vesey's Reports published by Little, Brown & Co.

In Smith v. Butcher, L. R. 10 Ch. Div. 113, it was held that the words "lawful heir or heirs" must be read literally and not held to mean "next of kin," "executors or administrators," or "children," and the case of Mounsey v. Blamire, 4 Russ. 384, was disapproved of in a well considered decision by JESSEL, M. R., wherein it is

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said that the true rule is that laid down by Vice Chancellor Kindersley in Low v. Smith, 2 Jur. (N. S.) 344, and that the learning herein is all summed up by Lord St. Leonards, in his speech in De Beauvoir v. De Beauvoir, 3 H. L. Cas. 524. See also, Leach v. Jay, L. R. 6 Ch. Div. 496; Gittings v. McDermott, 2 My. & K. 69; Thompson v. Thompson, 1 Coll. 388; Theobold on Wills, 224.

Toronto General Trusts Co., *vs.* Chicago, Burlington & Quincy Railroad Co.

(123 New York, 37.)

Trusts. — Title of trustee. — Foreign trustee. — Comity of nations.

Although there be no words of gift to the trustee, he takes the legal title to the trust estate, such title being necessary for the purposes of the trust.

Where the courts of New York will not, for reasons of public policy, aid foreign executors or administrators in removing assets from this state, to the prejudice of domestic creditors, a foreign trustee, having the legal title to the assets, may, by the comity of nations, maintain an action here in respect thereof, when he does nothing to the prejudice of domestic creditors.

Appeal from the Supreme Court, General Term, First Department. At the time of the death of the testator he owned 161 shares of the capital stock of the Chicago, Burlington & Quincy Railroad Company, and Mrs. Dunscomb, as executrix, transferred the certificates of stock to Charles H. Muirheid, as trustee, and he surrendered the certificates thus transferred to him to the railroad company, and it, by the National Bank of Commerce, as its agent, issued new certificates of the stock to him, as trustee, for Mrs. Dunscomb, under the will of her husband. He subsequently sold the stock, and the railroad company, through its agent, issued new certificates of stock to the purchaser thereof, and Muirheid converted the proceeds to his own use, and subsequently died insolvent. Thereafter an action was commenced in the high court of justice, chancery division, in Canada, for the appointment of a successor in the trust

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of Muirheid, in which Mrs. Dunscomb was plaintiff, and the administrator of the estate of Charles H. Muirheid and George Hoyles Dunscombe, an infant son of the testator, were defendants. In that action the plaintiff asked for relief, that a new trustee be appointed in the place of Charles H. Muirheid, deceased, and that such new trustee be authorized to take, accept, and receive the securities, and have the management and control thereof, according to the provisions of the will and codicil of George H. Dunscomb, deceased, and to dispose of the income, revenue, dividends and receipts thereof, in accordance therewith, and to carry the same into effect. The defendants in the action were properly served with process, and brought into court, and all parties being in court, and upon reading the pleadings and affidavits, and after hearing counsel, the court, on the 30th day of May, 1883, ordered and adjudged "that the Toronto General Trusts Company be, and they are hereby appointed trustees to collect and get in the outstanding assets and estate of George Hoyles Dunscombe, deceased, the testator in the pleadings named, as they accrue due, and to pay any moneys when collected into court, to the credit of this cause, subject to further orders;" and it made provision for the costs of the parties to the action. The Toronto General Trusts Company was, by the Canadian law, authorized to act as trustee in such a case, and this action was commenced on the 6th day of July, 1883, and the foregoing facts, and other material facts, were alleged in the complaint; and the complaint prayed judgment "that the defendants be ordered to deliver and transfer to said plaintiff 295 shares of the said Chicago, Burlington & Quincy Railroad Company, and to issue to this plaintiff, as trustee as aforesaid, certificates of stock for said 295 shares, and to pay to said trustee all dividends on said shares since the alleged transfer thereof, with interest thereon from the date the same were payable. And plaintiff further prays that, if it is impossible for the said defendant companies to issue or transfer said stock to plaintiff, then, and in that case,

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the said companies be decreed to pay over to said plaintiff the value of said stock, together with all such dividends as aforesaid, and interest thereon, and that the plaintiff may have such other and further relief as in the premises may be just, besides the cost of this action." After the commencement of this action, on the 27th day of July, 1883, the parties to the Canadian action again appeared in the Canadian court, and the following order was entered: "This court doth order and adjudge that the Toronto General Trusts Company be, and they are hereby, appointed trustees of the estate of George Hoyles Dunscomb, deceased, the testator in the pleadings named, and that they do pay any moneys, when collected, into court, to the credit of this cause, subject to further order;" and "that such amendment take effect as of the day of the date of the said judgment." This action was put at issue by answer on the part of the defendants, and was brought to trial at a special term of the court; and the court, after hearing the evidence produced by the parties, dismissed the complaint on the sole ground that the plaintiff did not have capacity to sue in this State; and a judgment was entered in favor of the defendants. From that judgment the plaintiff appealed to the general term, where it was affirmed upon the same ground, and then it appealed to this court.

F. K. Pendleton, for appellant.

Elihu Root, for railroad company, respondent, and *Frederick A. Ward*, for National Bank of Commerce, respondent.

EARL, J.—The complaint in this action was dismissed on the sole ground that the plaintiff did not have legal capacity to sue in this state, and therefore it is proper for us to consider only the question whether it did have such capacity.

The codicil to the will of the testator created a valid trust, and, although there were no words of gift to the

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trustee, he took the legal title to the trust estate. Such a title is necessary for the purposes of the trust, and hence it must be presumed that the testator meant to give it. (*Oates* v. *Cooke*, 3 Burrows, 1685; *Doe* v. *Homfray*, 6 Adol. & E. 206; *Doe* v. *Woodhouse*, 4 Term R. 89; *Leggett* v. *Perkins*, 2 N. Y. 297; *Tobias* v. *Ketchum*, 32 N. Y. 319; *Killam* v. *Allen*, 52 Barb. 605.

Muirheid, the trustee, could have maintained an action in the courts of this state to recover any of the trust property by anyone wrongfully detained here, or for the wrongful conversion of such property, or for damages thereto. Such an action would not have been in a representative capacity, but in his own right, as the legal owner of the property. It might have been necessary for him, upon the trial of such an action, to prove the will and put it in evidence for the purpose of showing his title, but it would not have been necessary for him to have the will admitted to probate in this state. (1 Williams' Ex'rs. [2d Amer. Ed.] 226, note, and Id. [7th London Ed.] 362, note; *Judson* v. *Gibbons*, 5 Wend. 224; *Middlebrook* v. *Bank*,* 42 N. Y. 135; *Smith* v. *Webb*, 1 Barb. 230.) So much is true as to the trust property generally. But here there is more. The executrix of the will assigned this stock to the trustee, and the defendants issued to him, as trustee, a new certificate therefor, and thus he became the legal owner thereof, and could, as such, have maintained an action here in reference to the same, without probate of the will here, as a legatee under a foreign will of specific chattels can, after assent to the legacy by the executor, maintain an action here to recover such chattels being in this state, without probate of the will here. So, if Muirheid had legal capacity to sue here, any one to whom he lawfully transferred his title had the same capacity.

It therefore remains only to be inquired whether the plaintiff has succeeded to Muirheid's title in such way that it has legal capacity to commence this action. It is not disputed that under the law of its being it had the capacity to become trustee of this trust.

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It was the plain purpose of the Canadian action to procure the appointment of a new trustee in the place of Muirheid, and that was a portion of the relief demanded. The action was brought in a court of general jurisdiction, and the court had jurisdiction of the subject-matter, and acquired jurisdiction of all the necessary parties. It had all the parties in open court; and, upon proof and admissions, rendered judgment which was properly entered. The judgment as entered was final, not interlocutory or provisional. It was somewhat informal and imperfect in its phraseology; but reading the complaint, and considering the purpose of the action and the relief demanded, there can be no doubt that it was the intention of the court to appoint the plaintiff trustee in the place of Muirheid. But whatever doubt there is as to the effect of the judgment as originaly entered is removed by the order subsequently made amending the judgment *nunc pro tunc* so as to make it conform to the judgment as originally pronounced. Between the entry of the original judgment and the amendment thereof, no new rights had intervened; and, hence, the court had the power to amend the original judgment so as to cause it, as amended, to have effect as of the date of its original entry. Such amendment was in furtherance of justice, and worked no injustice to any one. That the amendment, under such circumstances, was properly made, cannot be successfully questioned. (*Wright* v. *Nicholson*, decided in the United States supreme court, March 3, 1890, and reported in 10 Sup. Ct. Rep. 487.)

There can be no doubt, therefore, that the plaintiff was legally appointed trustee in Canada. While there was no formal transfer of the title of the trust estate to it, it was put in the place of Muirheid, and took the same title he had, and it thus took the legal title as trustee to whatever there was of the trust estate.

Having thus been clothed with the title to the trust estate in Canada by proceedings in the Canadian action, can it, standing upon that title, maintain an action here as trustee? We think this question was erroneously answered in the negative in the court below.

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It is the general rule that he who is the legal owner of property may maintain an action wherever it may be for its recovery, or for damages for its conversion. Generally his capacity to sue in such cases grows out of his legal ownership. It is believed that there is no exception to the rule where the legal owner sues in his own right, and not in a representative capacity. In such cases all owners stand upon the same footing. But the rule is somewhat modified when one sues in a representative capacity. Foreign executors and administrators cannot sue here, for reasons of public policy. The courts will not lend their aid to them in the removal of the assets from this state to the possible prejudice of domestic creditors. (*Peterson* v. *Bank*, 32 N. Y. 21.) Yet such personal representatives may make transfers of property which will be recognized as legal here. They may execute valid releases of debt due here, and they may come here and remove property from the state whenever they can do so without being obliged to ask the aid of our courts, and foreign receivers and assignees, taking their title to property by virtue of foreign laws or legal proceedings in foreign courts, may come here and maintain suits in our courts when they do not come in conflict with the rights or interests of domestic creditors; and why may not this trustee? Its position is not like that of an executor or administrator who is simply a representative of a dead person, gathering in and administering upon property for the benefit of others. But it is more like that of the legal owner of property who pursues it, or brings suit about it, for his own benefit. Its position is, at least, as favorable as that of foreign assignees of bankrupt and insolvent debtors, or of receivers of insolvent foreign corporations, who may come here, and by the comity of nations, maintain actions here, when they do nothing to the prejudice of domestic creditors. (*In re Waite*, 99 N. Y. 433; 2 N. E. Rep. 440.) Here there are no creditors who have any claims upon or interest in the property involved in this action.

We purposely abstain from examining the merits of

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this action, as they are not properly before us. We simply decide that the plaintiff has capacity to bring this action, and hence the judgment should be reversed, and a new trial granted, costs to abide event.

All concur.

Judgment reversed.

BEHRENS *vs.* BEHRENS.

(47 Ohio State, 323.)

ESTABLISHING LOST WILL.

Where the probate court has found and established the contents of a lost, spoliated or destroyed will, in a future proceeding to contest the validity of such will, the order of probate will be *prima facie* evidence of the due attestation, execution, validity, and contents of the will, and the burden of proof will be on the contestants to invalidate such will.

When a will, once known to exist, and to have been in the custody of the testator, cannot be found after his decease, the legal presumption is that it was destroyed by the testator with the intention of revoking it.

To strengthen such presumption, it is competent to prove the declarations of the testator after making his will, that he had destroyed, or intended to destroy, the same.

ERROR to the Circuit Court of Defiance County. The opinion states the facts.

Benjamin B. Kingsbury and *Henry Newbegin*, for plaintiffs in error.

J. R. Tyler, *Peaslee & Enos* and *Stephenson & Knapp*, for defendant in error.

DICKMAN, J. It is conceded that Daniel Behrens, on the 31st day of October, 1882, made and executed, in due form of law, his last will and testament. On the 28th

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day of November, 1884, he died, leaving real and personal property, and, as his heirs-at-law, Frederick Behrens and Henry Behrens, the plaintiffs herein, and George Behrens, the defendant, his only son. After his decease, it was discovered that his will had been lost or destroyed, and the question arose, whether the will was lost or destroyed prior or subsequent to the death of the testator, and if before his death, whether or not it was destroyed by the testator himself, with the intention of revoking the same. On the application of George Behrens, the probate court found that the will was not revoked by the testator, but that it had been lost or destroyed subsequent to his death, and thereupon established its contents to be as in the alleged copy produced in court, and admitted the same to probate.

In the action to contest the validity of the will, the order of probate was *prima facie* evidence for its due attestation, execution, and validity. By section 5948, Rev. St., last wills and testaments, which have been lost, spoliated, or destroyed, when established as to their contents and admitted to probate, are, in all respects, to be governed by the laws in force relating to other wills, not only as relates to the contents of the same, but in all other matters. In a proceeding to contest the validity of such a spoliated will admitted to probate, the burden of proof is on the contestants to invalidate it. *Haynes* v. *Haynes*, 33 Ohio St. 598; *Mears* v. *Mears*, 15 Ohio St. 90. In *Banning* v. *Banning*, 12 Ohio St. 437, it is held that, where the contents of a spoliated will have been found admitted to probate, and recorded in a proceeding duly had for that purpose in the probate court, such record is *prima facie* evidence in a future proceeding to contest the validity of such will, not only of the due attestation and execution of such will, but also of its contents; and on the trial of the issue whether the will admitted to probate is the last will of the testator or not, the same must stand, unless the jury are satisfied by a preponderance of proof that it is not, in substance, the will of the testator.

In assuming the burden of establishing, by a prepon-

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derance of evidence, that the will admitted to probate was not the last will of Daniel Behrens, it became material for the contestants to prove that his last will was not in existence at the time of his death, but had been revoked by the testator tearing, canceling, obliterating, or destroying the same, with the intention of revoking it. Section 5944, Rev. St. authorizes the probate court to admit to probate an unrevoked last will when the original has been lost, spoliated, or destroyed, subsequent to the death of the testator, or after the testator has become incapable of making a will by reason of insanity. The court in the matter of *Sinclair's Will*, 5 Ohio St. 291, in construing the same statutory provision then in force, held that the legislation of the state, as it then existed, did not permit a will lost, or destroyed, to be established, unless it was in existence subsequently to the death of the testator. "The general assembly," said SWAN, J., "deemed it either impolitic, as opening the door to imposition and perjury, or unnecessary, to permit wills lost or destroyed before the decease of the testator to be established."

The court, therefore, as an essential fact to be determined, charged the jury as requested by the plaintiffs: "Before you can find that it was the last will and testament of the said Daniel Behrens, you must find that it existed, and had not been revoked at the death of the testator, or at such time prior to his death when he ceased continuously after that to be of disposing mind and memory; and, unless you find from the evidence that the said will was actually in existence at the time when the said Daniel Behrens ceased to be of disposing mind and memory, at or prior to his death, then, the conclusion of law follows that the testator destroyed the will, with intent thereby to revoke it."

If the will did not exist at the time of the testator's death, and had been destroyed prior to that time, it could not be established under the statute as a will of which the original had been lost, spoliated, or destroyed, subsequent to the death of the testator.

And here it may be inquired what, if any, conclusion

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of law or presumption arises from the fact of the non-existence, at the time of the testator's death, of his last will and testament proved to have been made and executed. As requested by the plaintiffs, the court gave the following charge to the jury:

"The presumption is that, if a will be not found after the death of an alleged testator, it was destroyed with intention of revoking it. This presumption may be strengthened by the declarations made by the testator before his death, to the effect that he intended to destroy the will, and if you believe from the evidence that the will alleged to have been made on the 31st of October, 1882, by Daniel Behrens, was not in existence after his death, you are at liberty to believe from this fact alone that the said will was destroyed by said Behrens with the intention of revoking it, and you may consider as strengthening this presumption any declarations made to persons before his death, by the said Daniel Behrens, that he would destroy the will, or had destroyed the will, or intended his children should share equally in his property."

In giving the aforegoing instructions to the jury, and in admitting in evidence the declarations of the testator as to destroying his will, and dividing his property equally among his three sons, we find no error for which the judgment of the court of common pleas should have been reversed.

In general, it may be assumed that a will is kept in the custody of the testator himself, or under his control, to be changed, modified, or revoked according to his good pleasure. If, at his decease, it cannot be found, it is more reasonable to presume that he himself has destroyed his will, than that some other person has committed the crime, and incurred the penalty of secreting or destroying it. In *Betts* v. *Jackson*, 6 Wend. 181, it is said by Chancellor WALWORTH: "Legal presumptions are founded upon the experience and observation of distinguished jurists as to what is usually found to be the fact resulting from any given circumstances, and the result being thus ascertained, whenever such circumstances

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occur, they are *prima facie* evidence of the fact presumed; and I have no doubt that five wills, made with all due formality, have been destroyed by the testators, either in secret or when no one was present to be a witness to prove the fact to where there has been one destroyed or suppressed by fraud, or lost by time or accident, before the death of the testator." Indeed, it is now well settled, and is a principle of universal acceptance in both the English and American courts, that, where a will is proved to have once existed, and the testator retained custody of it, or had ready access to it, and it cannot be found after his death, a legal presumption is raised that the will was destroyed by him with the intention of revoking it. In the recent case of *Collyer* v. *Collyer*, 110 N. Y. 486, 18 N. E. Rep. 110, the rule is stated that when a will previously executed cannot be found after the death of the testator, there is a strong presumption that it was revoked by destruction by the testator, *and this presumption stands in the place of positive proof.* See also, 1 Redf. Wills, 329; 1 Williams, Ex'rs 157, and cases cited; 2 Amer. Lead. Cas. (5th Ed.) 510; *Foster's Appeal*, 87 Pa. St. 67; *Minkler* v. *Minkler*, 14 Vt. 125; *Betts* v. *Jackson*, *supra*; *Minor* v. *Guthrie*, (Ky.) 4 S. W. Rep. 179; *Hatch* v. *Sigman*, 1 Dem. Sur. 519; 1 Jarm. Wills, (5th Amer. Ed.) 290, and cases cited; *Wargent* v. *Hollings*, 4 Hagg. Ecc. 245; *Lillie* v. *Lillie*, 3 Hagg. Ecc. 184.

Such a presumption of revocation may be overcome by circumstantial or other proof to the contrary. It may be rebutted by showing that the testator had no opportunity to revoke, and that his will was destroyed after his death. And for this purpose, declarations of the testator to various members of his family down to a few days before his death, expressive of his satisfaction of having settled his affairs, and intimating that his will was left with his attorney, have been held to have been properly admitted. *Whiteley* v. *King*, 17 C. B. (N. S.) 756; *Keen* v. *Keen*, L. R. 3 Prob.& Div. 105. *In re Johnson's Will*, 40 Conn. 587.

But while the declarations of the testator may be

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used to weaken the presumption that he has destroyed his will with the intention of revoking it, his declarations may also be received as evidence to strengthen and fortify the presumption that he has destroyed his will with such intention. Whether it be the making of a will or the destroying of one, the competency of the testator's declarations as evidence is alike in each case, and for the same reasons admissible. *Collagan* v. *Burns*, 57 Me. 465. In *Keen* v. *Keen*, *supra*, in order to rebut the presumption of revocation arising from a will which was in a testator's possession not being found after his death, evidence was produced of declarations by the testator showing an intention to adhere to the will. The court held that evidence of declarations of an intention not to adhere to the will, produced by the opponents of the will, was admissible to contradict the evidence of adherence, whatever might be the form of words in which such intention was expressed, and therefore that a declaration by the testator that he had burnt his will was admissible, not as evidence of the fact of destruction, but as evidence of intention. SIR J. HANNEN, in his opinion in the case, says: "I think there can be no doubt that, while on the one hand evidence of statements, made by a testator subsequent to the execution of a will, that he intends to act in conformity with the disposition contained in the will, is clearly admissible, it necessarily follows that other statements made by the testator, to a contrary effect, must also be admissible. The admissibility of such evidence cannot depend on the form of words in which the intention is expressed. Therefore a statement by a testator that he has altered his mind as to the disposition of his property, and that he has therefore destroyed his will, although it may not be evidence of the fact of destruction of the will, is evidence of intention from which the fact of destruction may be inferred, there being other circumstances leadping to the same conclusion."

In *Lawyer* v. *Smith*, 8 Mich. 412, after the death of the testatrix, a will 25 years old was discovered, which was either torn or worn in several pieces. Whether the

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injury to the instrument was done by the testatrix or by some other person, and, if by her, whether accidentally or intentionally, and for the purpose of revoking the will, were held to be questions of fact for the jury; and to aid them in determining these questions, and not as separate and independant evidence of a revocation, the declarations of the testatrix, made after the date of the will, that she had destroyed it, were held to be competent evidence.

In *Patterson* v. *Hickey*, 32 Ga. 156, it was decided that, where the question is *revocavit vel non*, parol evidence, as to the acts and declarations of the testator, are admissible, although made at any time between the making of the will and the death of the testator.

A will is said to be ambulatory until the testator dies. Until his death the instrument has no force or effect, and, until then, he has the power to cancel or revoke it. If, from being clothed with this power, the presumption arises after his death that he destroyed his will, that presumption will be aided by his declarations as expressive of his feelings and intention. In *Weeks* v. *McBeth*, 14 Ala. 474, it was held that the declarations of the testator were admissible to strengthen the presumption of revocation, and to show that the will was destroyed by the testator *animo revocandi*. And it was there stated as the invariable rule in the courts of England to admit the declarations of the testator, either to strengthen, or to repel the presumption of revocation, arising from the non-production of the will after the death of the testator, or to explain the act of destroying or canceling it.

The case of *Smiley* v. *Gambill*, 2 Head, 164, was a contest upon the will of Margaret Stewart. The testatrix burned a paper which she believed was her will, and died in that belief. This was proved by her uniform declarations, and by her acts in disposing by deeds of some of the same property named in the will, and in applications made to write another will for her, on the ground that she had destroyed the first. CARUTHERS, J., in delivering the opinion of the court, said that, if the jury believed as matter of fact that Mrs. Stewart

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burned a paper which she thought was her will, although it was not with the intention of revoking by its destruction, and honestly believed that she had done it, and continued in that belief without any subsequent recognition or even knowledge of its existence, the paper propounded would not be her will. As testimony bearing on this question, her declarations alone might not be sufficient, but they were competent, and it would be for the jury to determine whether they together with other facts proved, made out the fact of burning, or intention to do so, by the act done.

The strongly expressed conclusion of the court in *Reel* v. *Reel*, 1 Hawks, 248, is in accord with the citations already made: "To reject the declarations of the only person having a vested interest and who was interested to declare the truth, whose fiat gave existance to the will, and whose fiat could destroy, and in doing the one or the other could interfere with the rights of no one, involves almost an absurdity; and they are received, not upon the ground of their being a part of the *res gestae*, for whether they accompany an act or not, whether made long before or long after making the will is entirely immaterial as to their *competency*. Those circumstances only go to their weight or credit with the tribunal which is to try the fact." See, also, *Collagan* v. *Burns*, *supra*; *Tynan* v. *Paschal*, 27 Tex. 286; *Youndt* v. *Youdnt*, 3 Grant, Ces. 140.

It is not necessary to refer to the numerous other authorities which we have examined, and which bear directly upon this branch of the case. No claim is made that a will may be revoked by the mere declaration of the testator, or otherwise than in the modes prescribed by the statute. But where a legal presumption is raised, upon the decease of the testator, that he destroyed his last will and testament in the statutory mode, with the intention of revoking it, it is obvious that, while the declarations of the testator may be admitted as evidence towards rebutting the presumption of such destruction and revocation before his death, they may with equally good reason be received as evidence to support and strengthen that presumption.

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It is urged, in behalf of the defendant in error, that the charge to the jury was erroneous and misleading. At the trial, the defendant excepted generally to the whole charge given by the court to the jury, without pointing out specifically the part or proposition of the charge excepted to, or the grounds of his exception. Of such an exception a reviewing court is not bound to take notice. *Adams* v. *State*, 25 Ohio St. 584, 29 Ohio St. 412 ; *Berry* v. *State*, 31 Ohio St. 219 ; *Everett* v. *Sumner*, 32 Ohio 562 ; *Powers* v. *Railway Co.*, 33 Ohio St. 429; *Insurance Co.* v. *Tobin*, 32 Ohio St. 77. But in the case at bar, upon an examination of the charge to the jury, we discover no error calling for a reversal of the judgment of the court of common pleas. The judgment of the circuit should be reversed, and that of the court of common pleas affirmed.

Judgment accordingly.

MASTERSON *vs.* TOWNSHEND.

(123 New York, 458.)

DEVISE BY IMPLICATION.—GIFT OF RENTS AND PROFITS.

A devise by implication may arise from a gift to testator's brother of the balance of the rents and profits of certain property after payment of an annuity to testator's widow so long as she remains unmarried, there being no other gift of the premises in formal language.

APPEAL from a judgment of the General Term of the Superior Court of New York. The facts appear in the opinion.

Theron G. Strong, for appellant.

George Wilcox, for respondent.

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GRAY, J. In order that plaintiff's right to the possession of the premises in question, and to the relief he demands, shall appear well-founded in law, his complaint must disclose, on its face, such a state of facts as that their admission by the defendants' demurrer would leave but the legal conclusion to be drawn in his favor. For some undisclosed reason, the case below was treated and disposed of as though by the demurrer the allegations of the complaint as to the legal conclusion of a title and interest in the plaintiff were substantially admitted, and the testamentary devise, which lies at the foundation of plaintiff's claim of title, apparently went without interpretation or consideration. To the defendants' contention here that the heirs-at-law of testator have taken no title, under the devise in question, the plaintiff replies that they are precluded from occupying that position, inasmuch as "all the allegations of the complaint are admitted by the demurrer." Of course there is nothing in such a reply; for, by the demurrer, no admission is made save as to such relevant facts as were well pleaded. There could be no admission by that pleading of any legal conclusions, or of any interpretation placed by the plaintiff upon the devise.

The question, therefore, presents itself as to what was the effect of the devise upon the title to the real estate of which the testator died seized.

The devise is stated at length in the complaint in the following words:

"*Third.* I hereby devise and convey all my undivided one-half interest in the lot of land and appurtenances situate on the corner of Fifty-fourth street and Seventh avenue in the city of New York, now owned by me and my brother Peter Masterson, jointly, in trust to my said executor to collect the rents, issues, and profits of the same and pay over six hundred dollars thereof to my wife so long as she remains unmarried, and the balance of said rents and profits my executors shall pay to my said brother, Peter Masterson, but if, in the discretion of my said brother and my said executor, it should be

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deemed advisable to sell said real estate, then my said executor is hereby authorized to unite in a sale of said premises, and is hereby empowered to execute all needful conveyances for that purpose, and from the proceeds of such sale pay to my wife the sum of six hundred dollars annually as long as she remains unmarried, and, upon her marriage, or death before marriage, then all of said proceeds are to be paid to my brother Peter Masterson."

As the widow has remarried, the argument of the plaintiff is that the trust created by the will thereupon ceased, and that there was no testamentary disposition made of this estate after the happening of that event. He claims, therefore, that it has reverted to the heirs of the testator, of whom he is one. In that view we are unable to agree with him.

This is a plain case of a devise by implication, whereby, upon the death of testator, his brother Peter became vested with the title to the real estate, subject only to the trust provision made for testator's widow. However incomplete the language to express the purpose of the testator, an intention and an understanding on his part are evident that his brother Peter should take as devisee the property, which was the subject of disposition in that clause. What the testator has imperfectly done, by way of expression, is effectuated by the application of well known legal rules. In the construction of a testamentary disposition, where the language is unskillful or inaccurate, but the intent can be clearly collected from the writing, it is the duty of the court to give effect to that intent, subject only to the proviso that no rule of law is thereby violated. (1 Rev. St. 748, § 2; *Purdy* v. *Hayt*, 92 N. Y. at page 454.) Courts have, from an early day, repeatedly upheld devises by implication, where no gift of the premises seems to have been made in the will, in formal language. (*Goodright* v. *Hoskins*, 9 East, 306; *Jackson* v. *Billinger*, 18 Johns. 368; *Matter of Vowers*, 113 N. Y. 569, 21 N. E. Rep. 690.)

They are justified in so doing whenever such a con-

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struction expresses what the testator manifestly intended to express. The presumption here of a devise to Peter by implication is so well founded as to make it one which is free from doubt in the mind. The facts, which are disclosed to us, combine to raise it. There is the gift of all of the rents and the profits of the land to the testator's brother, after the widow's annuity is paid. There is a gift to the brother of all the proceeds of a sale of the property, beyond what is required for the payment of the widow's annuity. Though testator left other brothers, and sisters, there is no mention made of them. There is the further significant circumstance that some power over the disposition by sale of the land is given to Peter. It is true that it is an authority only to advise or to consent in the execution of the power of sale by the executor; but when we consider that fact in connection with the fact that a sale would result in vesting in him the proceeds beyond any cavil and doubt, an inference arises, and one which seems irresistible to my mind, that the testator supposed it of no consequence to his brother's interests whether the estate remained intact, or was converted into money. The case is one where the presumption is independent of conjecture. It rises beyond a mere surmise, for it is based on circumstances which leave no hesitation in the mind of the court as to what was the testator's purpose. The formal words of a devise to Peter may be absent, but it is perfectly clear that it was the intention to devise the land, and that would be consistent with the expressed gift of the proceeds of a sale. The rule of construction being satisfied by the presence of the elements establishing a presumption, the courts must read into the clause a devise of the land to the brother, subject to the trust provision for the widow. The power of sale does not affect the question of Peter's rights other than to emphasize them. In the event of its execution, the testator gives to Peter all of the proceeds of the sale not required to pay his wife $600 annually during her life or widowhood. Nothing could more strongly evidence a condition of

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mind in which the testator believed his brother Peter would receive all of the estate, subject to the widow's provision, and whether it remained in the shape of realty, or was converted into money, than does this language of the clause.

The judgment recovered by the plaintiffs should be reversed, and a judgment entered dismissing his complaint, with costs.

All concur.

Judgment accordingly.

LITTLE *vs.* GILES.

(25 Nebraska, 313.)

DEVISE OF FEE.—WORDS OF INHERITANCE.—LIMITATION OVER AFTER ABSOLUTE DEVISE.—EVIDENCE.—ATTORNEY AND CLIENT.

At common law, a devise of real estate, in order to convey the fee, must contain words of inheritance or perpetuity; but under the statutes of this state such words are not necessary to convey the fee, and every devise of land is to be construed to convey all of the estate of the devisor therein, unless it shall clearly appear by the will that the devisor intended to convey a less estate.

When a testator devises all his estate, real and personal, giving his devisee the power of unqualified disposition of the property devised, the devisee may convey the legal title thereto; and a limitation over in a subsequent clause of the will, in favor of other persons, of "all of the estate herein bequeathed, or whatever may remain" at the marriage of the first taker, will not affect the titles previously conveyed.

Evidence of the situation of the parties may be received when it is necessary to a correct understanding of a bequest, together with the facts and circumstances which may reasonably be supposed to have influenced the testator in making the will, in order that the court may ascertain his motives and intention.

An attorney who sells real estate for his client, and represents the title to be good, which representation is relied upon, cannot thereafter assert title in himself to any real estate so sold.

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APPEAL from the District Court of Lancaster County.

O. P. Mason and *J. M. Woolworth*, for appellants.

Harwood, Ames & Kelly, T. M. Marquett and *W. T. Lamb*, for appellees.

MAXWELL, J. This action was instituted by the plaintiffs, 69 in number, against the defendants, to quiet the title to certain real estate in the city of Lincoln. Jacob Dawson was the common source of title, and the plaintiffs claim under his widow. The defendants claim under his children, and the determination of the case depends upon the construction of the will of said Jacob Dawson made on the 10th day of May, 1869. He died on the 18th day of June following, leaving surviving him his wife, Editha J. Dawson, and six minor children. The will, omiting the formal parts, is as follows:

"After all my lawful debts are paid and discharged, the residue of my estate, real and personal, I give, bequeath, and dispose of as follows, to wit: To my beloved wife, Editha J. Dawson, I give and bequeath all my estate, real and personal, of which I may die seized; the same to remain hers, with full power, right, and authority to dispose of the same as to her shall seem most meet and proper, so long as she shall remain my widow; upon the express condition, however, that if she should marry again, then it is my will that all of the estate herein bequeathed, or whatever may remain, should go to my surviving children, share and share alike; and, in case any of my children should have deceased leaving issue, then the issue so left to receive the share to which said child would be entitled. I likewise make, constitute, and appoint my said wife, Editha J., to be executrix of this my last will and testament; hereby revoking all former wills made by me."

This will was duly admitted to probate, and the real estate belonging to the estate of Jacob Dawson was conveyed by the widow under the will.

In the trial of the cause a large amount of testimony

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was taken in the case, which is preserved in the bill of exceptions now before us.

The court made the following findings: "The court finds first that the will executed by Jacob Dawson on the 15th day of June, 1869, and under and by virtue of which said Dawson disposed of said real estate in controversy, was intended to and did vest the full and complete title in fee simple to said real estate in his widow, Editha J. Dawson, so long as she should remain single.

"2. That said Jacob Dawson at the time of the making and execution of said will, and at the date of his death, was seized of very little personal property, and was possessed of practically no means aside from the real estate in controversy, and that it was the intention of said testator that the full and complete legal and equitable title to said real estate should vest in Editha J. Dawson, so long as she should remain single and unmarried, for the support and maintenance of herself and her children, who were minors at that time.

"3. That said Editha J. Dawson sold and conveyed said real estate for a full and valuable consideration to plaintiffs and their grantors, receiving the consideration money so paid for said real estate for the use of herself and her minor children, and that said proceeds were so used.

"4. That the several plaintiffs in said petition named, as their interest appear at the date of the trial of this cause, are entitled to the relief as prayed for in their said bill."

Of the same date, but said to have been dated back, we find the following additional findings; the individual names of the plaintiffs and defendants being given in the title of the judgment.

"Now, on this 14th day of December, 1887, this case coming on further to be heard, and the court having duly considered the pleadings and testimony therein, and listened to the argument of the counsel, and having been duly advised in the premises, doth find, all and singular, the issues joined in said action in favor of the plaintiffs, and the allegations of the plaintiffs' petition to be true, and doth further especially find:

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"1. That the will set forth in the pleadings in said action, executed by Jacob Dawson on the 15th day of June, 1869, and by virtue of which said Dawson disposed of said real estate in controversy herein, was intended by said Dawson to convey and deed, and have a full title in fee simple, to said real estate, to his widow, Editha J. Dawson, so long as she should remain such widow, with full and lawful power and authority to sell and convey the same during her widowhood.

"2. That said Jacob Dawson at the time of making and execution of said will, and at the time of his death, was seized of very little personal property, and was possessed of practically no means aside from the real estate in controversy, and that it was the intention of said testator that the full and complete legal and equitable title to said real estate should vest in said Editha J. Dawson, so long as she should remain single and unmarried, for the support and maintenance of herself and children, who were minors at that time, with full power and authority to sell and convey the same in fee simple during her said widowhood.

"3. That said Editha J. Dawson sold and conveyed said real estate for full and valuable consideration to the plaintiffs below named, and their grantors, receiving the consideration money so paid for said real estate, for the use of herself and her minor children, for their support, nurture, and education, and that said proceeds were in fact so used.

"4. That the said several plaintiffs below named, as their interest appears at the date of the trial of this cause, are respectively entitled to relief as prayed for in their petition herein. To each of which findings defendants severally except.

"It is therefore considered, ordered, adjudged, and decreed by the court here that the said defendants, and each and all of them, and all persons claiming through or under them, or any of them, or acting, or assuming to act, by the authority or with the connivant defendants, or any of them, be, and are, hereby, perpetually restrained and enjoined from in any manner, by suit,

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action, or proceeding, by law or in equity, in the courts of this state, or in any other court, assailing or traducing or questioning the title or possession, or right of possession, of Samuel W. Little to the premises in the amended petition described; that is to say:" (Describing the lots.)

The court then proceeds to describe the property to which each plaintiff is entitled, and rendered a decree as prayed in the petition. The defendants object in their brief to this latter finding and judgment, but, as we find them signed by the judge who tried the cause, they are properly in the record. The defendants appeal.

The will in question was construed by the supreme court of the United States in *Giles* v. *Little*, 104 U. S. 291, and it was held that the will merely conferred an estate upon Editha Dawson during widowhood, and, in case she married again, the remainder in fee passed to his children. The words in the will, "or whatever may remain," were construed as applying alone to the personal estate, and did not effect the realty. The de-decision is based on the prior one of *Smith* v. *Bell*, 6 Pet. 68.

At common law, in order to devise lands to another in fee, it was necessary to use words of inheritance, or equivalent words, showing an intention to give such estate: and a mere devise of real estate without words of inheritance gave the devisee only a life estate.

"The proper and technical mode of limiting an estate in fee simple is to give the property to the devisee and his heirs, or to him, his heirs and assigns, forever; but such an estate may, even under a will made before 1838, be created by any expression, however informal, which denotes the intention." See 3 Jarm. Wills, (5th Amer. Ed.) 30 *et seq.*; *Dew* v. *Kuehn*, 25 N. W. Rep. 215. The presumption at common law is that only a life estate was intended to be devised, unless words of inheritance or words of like import were used.

The construction of the will in question by the United States supreme court, under the common law, had that controlled the case, therefore, no doubt, was correct.

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The common law rule, however, has been changed in this state in two important particulars: *First*, "the term 'heirs,' or other technical words of inheritance, shall not be necessary to create or convey an estate in the simple." (Comp. St. c. 73, § 49;) and, *second*, "every devise of land in any will hereafter made shall be construed to convey all the estate of the devisor therein which he could lawfully devise, unless it shall clearly appear by the will that the devisor intended to convey a less estate." Id. c. 23, §124.

The first of these sections is not referred to in the opinion of the United States supreme court, and probably the court's attention was not called to it, and the latter section was by mistake, no doubt, copied incorrectly; the word "clearly" being omitted. *Giles* v. *Little*, 104 U. S. 299. Mr. JUSTICE WOODS, therefore, in writing the opinion, gave no weight to the section whatever. The section of the statute in question was copied from the statute of Michigan, and its proper construction was before that court in *Weir* v. *Mich. Stove Co.*, 44 Mich. 506, 7 N. W. Rep. 78; *Chandler* v. *Shaw*, 52 Mich. 18, 17 N. W. Rep. 223.

In *Weir* v. *Mich. Stove Co.*, it is said: "The language of the testator in the bequest to his wife is clear and unqualified, and, unless restricted by what follows, should not be open to question. Does it clearly appear by what follows thereafter that the devisor intended to convey less than his entire estate to his wife? If there are doubts, then, under the statute, they must give way to the otherwise clearly expressed intention."

In *Dew* v. *Kuehn*, 64 Wis. 300, 25 N. W. Rep. 212, the supreme court of Wisconisn, under a statute substantially the same as our own, hold that the statute changed "the rule as to the presumption of the estate devised," and such we understand to be the effect.

In *Robbin's Ex'rs* v. *Robbins*, 9 S. W. Rep. 254, where the testator in his will had directed certain real estate sold as soon as the executor thought best for the estate, or his widow, the proceeds to be invested in bonds for her use; she was prohibited from loaning the proceeds,

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but permitted to use the interest, as well as the rents. There were other devises of property to the wife, "to do with as she might think fit." The court held that she took an absolute fee in the land, in view of the Kentucky statutes that estates shall be deemed in fee simple, unless a contrary intention appear.

Applying this rule to the case at bar, after providing for the payments of his debts, the testator devises, "To my beloved wife, Editha J. Dawson, I give and bequeath all my estate, real and personal, of which I may die seized; the same to remain and be hers, with *full power, right, and authority to dispose of the same as to her shall seem proper*, so long as she remains my widow." The conditions will be considered presently. No one will contend that it clearly appears from the above language that the testator did not intend to devise the fee.

In *Kaufman* v. *Breckinridge*, 117 Ill. 305, 7 N. E. Rep. 666, the bequest was in the following words: "I give and bequeath to my beloved wife, Martha Long, all my goods, estates, and chattels, real and personal and mixed, to have, hold, and use the same so long as she may remain my widow; said goods, estates, etc., to be disposed of and used agreeably to her direction and approval, and in such manner as she may deem most conducive to the welfare and comfortable subsistence of herself and our beloved children, William D. Long, Henry C. Long, and Lucy L. Breckinridge." An exception was made in favor of the homestead, and the court held that a deed made by the widow for a portion of the devised real estate, except the homestead, conveyed the fee.

In *Henderson* v. *Blackburn*, 104 Ill. 229, the terms of the bequest were as follows: "After the payment of said funeral expenses and debts, I give, devise, and bequeath unto my beloved wife, Polly Blackburn, all of my estate, both real and personal, to have and to hold, or to dispose of so much of the same as she may need, or wish to use, during her lifetime." The court held that the widow had the power to dispose of the property for her own purposes during her lifetime, but, as the deed made

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by her did not take effect until after her death, it was not within the terms of the power.

In *Pruden* v. *Pruden*, 14 Ohio St. 251, the terms of the bequest were: "I do give and devise to my beloved wife, Mary (after payments named in above items first and second), in case she shall survive me, all and singular, my moneys, credits, rights, and choses in action, personal and real estate and property, for the benefit and support, and for her to have and hold during the term of her natural life." The court held that the words, "for her benefit and support," gave the widow the right to use either the principal or interest, or both, so far as may be necessary for this purpose.

In *Helmer* v. *Shoemaker*, 22 Wend. 137, it was held that where a testator devises all his real and personal estate to a devisee, giving him the power of unqualified disposition of the property devised, the devisee takes a fee simple absolute in the real estate.

In *Vanhorne* v. *Campbell*, 100 N. Y. 287, 3 N. E. Rep. 316, 771, it was held that an absolute power of disposition, and next to a primary devise in fee, is deemed conclusive of the existence in the devisee of an absolute estate. The opinion of the majority of the court contains an exhaustive review of the decisions to the year 1885. RUGER, C. J., dissented.

In *State* v. *Smith*, 52 Conn. 557, the testator, after bequeathing one-half of his estate to his wife, made the following bequest: "I give and bequeath to my wife, Sophia, the remaining half of my estate, both personal and real, with the right to sell, dispose of, convey, and use the same without any restriction whatever, during her natural life; and at her decease one-half of what remains of my estate I give and bequeath to my brother Willis Anderson, and to my sister Polly Cone, and my sister Nancy Hungerford, to be divided between them equally." The court held that the widow had an absolute power to dispose of the second half of the estate during her life, and that a conveyance made by her carried a good title and fee.

Many other cases to the same effect might be cited,

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but the further citation of authorities on this point seems to be unnecessary. It may be said, however, that the words of the condition qualify the "full power, right, and authority to dispose of the property as to her shall seem meet and proper, so long as she shall remain my widow." The limitation on this right to convey is declared in the will to be "upon the express condition, however, that if she shall marry again, then it is my will that all of the estate herein bequeathed, or *whatever shall remain*, shall go to my surviving children, and share alike." This, however, is not a condition affecting conveyances previously made by the devisee, but simply declares that upon her marriage the power to convey the estate shall cease.

In *Campbell* v. *Beaumont*, 91 N. Y. 464, the terms of the will were: "I leave to my beloved wife, Mary Ann, all my property, * * * to be enjoyed by her for her sole use and benefit, and in case of her decease, the same or such portion as may remain thereof, it is my will and desire that the same shall be received and enjoyed by her son Charles; * * * requesting him at the same time that he will use well, and not wastefully squander, the little property that I have gained by long years of toil." In an action for a construction of the will, it was held that the widow took an absolute title, and therefore had the power to dispose of the whole estate, unaffected by the provision as to her son.

In *Helmer* v. *Shoemaker*, 22 Wend. 137, the testator gave all his estate, real and personal, of which he was then or should be in possession at the time of his decease, to his wife, Margaret, without any words of limitation. He then added: "I also will and bequeath to my daughter Charity Helmer, the wife of Michael Helmer, all the avails of the property that may remain at the decease of my wife, Margaret, until Rudolph Helmer, the son and heir of her, the said Charity, shall become 21 years of age; then the said property, more or less remaining, shall be the property of him, the said Rudolph, supporting his mother, Charity, if it may be wanting, so long as the property remains." It was held

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that the original devisee took an absolute title by the will, and that her conveyances of the real estate were valid and effective.

In *Donald* v. *Walgrove*, 1 Sandf. Ch. 274, cited with approval by the court of appeals of New York, in *Vanhorne* v. *Campbell*, 100 N. Y. 287, 3 N. E. Rep. 316, 771, the terms of the will were as follows: "After all my just debts be paid and discharged, I give and bequeath unto my beloved wife, Esther Walgrove, all my personal estate, goods, and chattels. I also devise unto her, the said Esther, all my real estate, the same to be at her entire disposal; but, should any part thereof remain unsold at the time of her decease, I devise the same to those of my children who are now living (viz., George Azaris John, William, Stewart, and Eliza,) which may then survive, and to the heirs of those of them which may have deceased in the interim, to be equally divided among my said children, share and share alike, in such manner as my executors hereafter named shall believe to be most for the advantage of my said children and their heirs, whether to sell and divide the proceeds, or otherwise." The chancellor says: "I find the doctrine well settled that an absolute ownership or capacity to sell in the first taker, and a vested right by way of executory devise in another, which cannot be affected by such alienations, are perfectly incompatible estates, and repugnant to each other, and the latter is to be rejected as void."

The leading case on this subject is *The Attorney General* v. *Hall*, Litz. 314 (decided in 1731), where the testator, being the owner of real and personal estate, devised it to his son and the heirs of his body, but if he should die leaving no heirs, then so much of the real and personal estate as the son should be possessed of at his death was devised to the Goldsmiths' Company, at London, for charitable purposes. The son conveyed the real estate, and transferred the personal property to his wife, and died without issue. The court held that, as the absolute ownership of the property had been given to the son, who had disposed of the same, that the limitation over to the Goldsmiths' Company was void.

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In *Ide* v. *Ide*, 5 Mass. 505, the testator bequeathed to his son, and to his heirs and assigns, forever, certain real and personal estate; and then added that, if the son died without heirs, the estate which he *should leave* was to be equally divided between two other persons. The son conveyed the real estate, and died without leaving heirs. The question arose between those claiming under the limitation over, and those claiming under a conveyance from the son, and the court held that the conveyance passed the title. It said: "Whenever, therefore, it is the clear intention of the testator that the devisee should have an absolute property in the estate devised, a limitation over must be void, because it is inconsistent with the absolute property supposed in the first devisee. And a right in the first devisee to dispose of the estate devised at his pleasure, and not a mere power of specifying who may take, amounts to an unqualified gift."

These cases are followed by *Jackson* v. *Bull*, 10 Johns. 19, and *Jackson* v. *Robins*, 16 Johns. 537, and have been followed by the courts of New York and generally by the courts of other states from that time until the present; and, so far as the writer is advised, there are but few decisions to the contrary.

In the case at bar, if the widow married again, then whatever should remain of his estate should descend to his children; clearly implying that nothing but the estate undisposed of should thus descend. We know of no reason why this should be limited to the personal estate when there is no such restriction in the will. In our view, therefore, the words apply to such portion of the estate, either real or personal, as should remain undisposed of, and only to such portion.

A large amount of testimony was introduced for the purpose of showing the situation of the testator, the number of his family, and their means of subsistence, actual and prospective, at the time he made his will. Words, when used with propriety, are a very imperfect vehicle of thought, and frequently, to correctly appreciate their meaning, it is necessary to possess a knowl-

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edge of the persons and things to which they are applied; hence the law permits a will to be read in the light of the surrounding circumstances, and authorizes the introduction of such extrinsic evidence as will enable the court to place itself in the testator's situation, and to see things as he saw them, and to apply his language as he intended it. The testimony tends to show that the testator possesed less than $1,000 worth of personal estate. This included personal property which rightfully belonged to the wife. He was owing a debt secured by a mortgage in Otoe county, somewhat in excess of $2,000. A decree of foreclosure was rendered in September in the year 1869, and a sale had under the decree. After selling the mortgaged property, there was a deficiency of more than $2,000, which was afterwards paid. His property consisted almost exclusively of real estate in Lincoln,—the property in dispute.

M. H. Hathaway, a witness called by the plaintiffs, seems to have possessed unusual opportunities for acquiring information in regard to the estate. He testifies:

Q. Were you well acquainted with him?

A. I was very well acquainted.

Q. Are you a relation?

A. I was a cousin, and also a brother-in law of Jacob Dawson.

Q. Were you ever in business with him?

A. I was at different times and in different ways. I was in partnership with him; came west with him; and been in business with him.

Q. Do you know anything about his making arrangements to build a new dwelling-house before he died; and, if so, state all you know about it?

A. In '68, late in the fall, he showed me where he expected to build,—southeast of the capitol.

Q. Was a building ever put up at that place?

A. Yes, there was a building put up there after his death.

Q. Did he state to you anything about the plan or what kind of a building he desired?

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A. I don't know the size or style of the building. It is a vague impression in my mind that he talked about a stone building there, but I would not swear positive as to that. I have that sort of impression that he talked about putting up a stone building.

Q. Did you know the land that he owned at that time,—the property that he owned here at that time,—the real estate?

A. He showed me about all that he did own, I think,—talked to me very thoroughly about it.

Q. Was a part of that the same as what is known as "Dawson's addition to South Lincoln?"

A. Yes, sir.

Q. Did you know at that time what that land was worth—about the time of his death, in 1869?

A. I would not like to put any price. Of course, people were asking wild prices frequently; I thought so, at least. He tried to sell me a piece of land,—a 40 acres that lies very near south, I think, from the capitol; but I was afraid; thought that he asked too much for the land, and was afraid to buy.

Q. BY THE COURT. You cannot state the price?

A. I cannot state the price.

Q. What kind of land was it, as to being cultivated or uncultivated,—productive or unproductive?

A. I don't think he had but very little under cultivation, if any.

Q. Do you know anything about his financial affairs—whether or not he had any income, except it was from the real estate he had? If so, state what you know about that.

A. I am pretty confident he had not any income. I don't think his property or anything else was productive of any income,—produced any income.

Q. Do you know anything about his being in debt at the time he died? If so, state what you know about that.

A. He was badly involved a few years before he died, and left some debts not canceled when he died; the exact amount, of course, I cannot say, but I know it in a general way.

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Q. Did you ever have any conversation shortly before he died, and about his finances? If so, state what they were.

A. Well, I had some conversation with him at this time, late in the fall of '68, but I cannot say as to any specified amount.

Q. What did he say about his finances at that time?

A. I don't know as I can give any special figures or facts; but, if you would allow me, in a little kind of round-about way, to show how the conversation was, I could make it plain.

Q. State the conversation, any way.

A. He wanted me to come to Lincoln, and go with him into a printing office, telling me something about what he owed, and how he expected to get through with it; and that is about the sum and substance of the conversation. I advised him to keep out of it.

Q. You cannot state any particular amount?

A. I cannot. It is in a kind of a general way—an impression on my mind,—some $2,000 or $3,000. But it is nothing positive or definite.

Q. You stated that his property was not productive. By what means was he supporting, prior to his death, his family?

A. Some two or three years before his death, I think, it was by scraping up salt in the salt basin, and hauling it to Nebraska City, and selling it. Later than that, it was either by borrowed capital or selling things.

The clear weight of testimony corroborates that of Mr. Hathaway. There is some testimony as to the amount per month which the estate could collect for rents, but, if we consider the highest amount proved as the correct sum, it is wholly inadequate to meet the obligations against the estate. To provide for these there is no doubt the widow was empowered under the will to sell and dispose of such portions of the real estate as she found to be necessary. It was said on the argument, in effect, that she would have had this power under the statute; that is, upon a petition being filed in the proper court, showing the necessity for a sale of the

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real estate, or some portion thereof, that an order to sell would have been granted under which sales could have been had, and the title conveyed. But sales procured in this manner are necessarily expensive, and must be at public auction, to the highest bidder. This is necessary to prevent collusion and fraud, but experience has shown that it is rare, indeed, that property can be sold in this way at a forced sale for its full value, or as well as at private sale. The testator evidently was a man of considerable experience in business affairs, and no doubt sought to avoid the expense, delay, and inconvenience of making sales under orders of court; hence his widow was clothed with power to make conveyances.

So far as we can see, the widow acted in good faith in selling the estate, supporting the children of the testator, and paying the debts. She does not appear to have squandered the estate. It may be said that the amount realized from the sales was but little compared to the present value of the property. That is true, but we must remember that most of these sales took place while Lincoln was an inconsiderable town, and before there was any certainty as to its future growth and prosperity. That uncertainty has been removed by the events of the last six or eight years. At the times the sales took place the amount realized from each tract does not appear to have been disproportionate to its value. But, however this may be, even if Mrs. Dawson had squandered the estate before marrying again, it could not affect conveyances made by her before such second marriage. The title of such grantees does not depend upon the degree of care which she exercised in disposing of the property, but on her power to sell and convey.

The testimony shows that, in 1875, Mr. L. C. Burr, one of the defendants herein, became the attorney of Mrs. Jacob Dawson, and sold lots for her belonging to said estate, and represented the title to be good. These lots seem to have been sold largely on credit, and he collected a number of the payments thereon for her, and

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in all cases, so far as the evidence shows, he held up the title as good, and purchasers testify that they relied on such representations. He testifies that he had not examined the will until late in the year 1879, and then discovered the want of power therein; and that upon such discovery he advised Mrs. Dawson thereafter to execute deeds without covenants. The evidence shows that at the time of this alleged discovery the real estate had all been sold and Mrs. Dawson was about to marry again. None of the purchasers, however, seem to have been apprised of the alleged defect of title, or that his former representations were made under a mistake. There is an effort in the evidence to show that this was merely his opinion as distinguished from a statement of a fact, but the representations seem to have been such as to preclude Mr. Burr from claiming title as against such parties.

The testimony also shows that lots were sold, and the proceeds used directly to supply the necessary wants of the widow and the minor heirs.

Mr. George Weber, a witness called by the plaintiffs, testified:

Q. Are you acquainted with the property known as "Dawson's addition to South Lincoln?"

A. I am somewhat.

Q. Are you one of the plaintiffs in this suit?

A. Yes, sir.

Q. Did you ever buy any of that property in Dawson's addition to South Lincoln?

A. I did.

Q. Who did you pay for that property?

A. I paid it up, part of it to L. C. Burr, and the larger part of it to Mrs. Dawson direct, in the shape of groceries and provisions.

Q. For her family?

A. For her family.

Q. Is that the property now in dispute you claim in this action that you paid for in that way?

A. It is.

Q. State when you paid for it in that way.

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A. To the best of my recollection, it was 1876 or 1877. I am inclined to think it was '77; it was soon after this,—two years.

Q. How long were you paying for it in that way?

A. I think about a year.

Q. State how the payments were made.

A. Mr. Burr, who was the attorney for Mrs. Dawson at that time, came to me, and asked me whether I would not as soon pay for that property in groceries and provisions for Dawson's family. I said, "Of course, I would like the chance to do it." So he says: "You give Mrs. Dawson a pass-book, and let them have whatever they want in the line of groceries, and put it in the pass-book, and every month, or as often as you feel like doing it, present the amount, and I will indorse it on the notes." That was satisfactory to me, and I thought Mr. Burr was a nice man for giving me the chance to do it.

Q. What business were you in at that time?

A. Grocery business.

There is other testimony to the same effect. The heirs seem to have been fed and clothed during their minority with means derived from the sales of their father's estate, and while retaining all these benefits, as well as the benefit of the payment of the debts of their father by such sales, they ask for the land also. If they were entitled to such a judgment, it would be upon purely legal grounds, and not for equitable considerations.

It is unnecessary to refer further to the testimony. There is no doubt, both from the will itself, and from the circumstances as proved under which it was made, that the intention of the testator was to empower his widow to convey all of his real and personal estate if she saw fit to do so, and, as she had exercised this right and power before her remarriage, the grantees under her deeds acquired all the title of the testator to such lands.

The decree of the district court as to all the plaintiffs who did not disclaim is therefore affirmed.

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Judgment accordingly.

The other judges concur.

See further as to gifts over after an absolute devise or bequest, Bills v. Bills, 7 Am. Prob. Rep., *supra*, p. 135, and the note thereto; also Halliday v. Strickler, 7 Am. Prob. Rep., *supra*, p. 212. As to words necessary to create a fee, see Giles v. Anslow, 7 Am. Prob. Rep. *supra*, p. 174; and as to devise by implication from gifts of rents and profits, see Masterson v. Townshend, 7 Am. Prob. Rep., *supra*, p. 308.

RIGGS *vs.* PALMER.

(115 New York, 506.)

STATUTORY CONSTRUCTION.—EQUITABLE CONSTRUCTION. —RIGHTS OF LEGATEES AND HEIRS.—MURDER OF TESTATOR TO PREVENT REVOCATION.

A legatee and heir who murders the testator in order to prevent the revocation of the will, shall not be suffered to reap the benefit of his crime either under the will nor under the statute of distributions.

APPEAL from the Supreme Court, General Term, Third Department The facts are stated in the opinion.

Leslie W. Russell and *C. E. Sanford*, for appellants.

W. M. Hawkins, for respondents.

EARL, J. On the 13 day of August, 1880, Francis B. Palmer made his last will and testament, in which he gave small legacies to his two daughters, Mrs. Riggs and Mrs. Preston, the plaintiffs in this action, and the remainder of his estate to his grandson, the defendant Elmer E. Palmer, subject to the support of Susan Palmer, his mother, with a gift over to the two daughters, subject to the support of Mrs. Palmer in case Elmer should survive him and die under age, unmarried, and without any issue. The testator, at the date of his will, owned a farm, and considerable personal property. He

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was a widower, and thereafter, in March, 1882, he was married to Mrs. Bresee, with whom, before his marriage, he entered into an ante-nuptial contract, in which it was agreed that in lieu of dower and all other claims upon his estate in case she survived him she should have her support upon his farm during her life, and such support was expressly charged upon the farm. At the date of the will, and subsequently to the death of the testator, Elmer lived with him as a member of his family, and at his death was 16 years old. He knew of the provisions made in his favor in the will, and, that he might prevent his grandfather from revoking such provisions, which he had manifested some intention to do, and to obtain the speedy enjoyment and immediate possession of his property, he willfully murdered him by poisoning him. He now claims the property, and the sole question for our determination is, can he have it? The defendants say that the testator is dead; that his will was made in due form, and has been admitted to probate; and that therefore it must have effect according to the letter of the law.

It is quite true that statutes regulating the making proof, and effect of wills and the devolution of property, if literally construed, and if their force and effect can in no way and under no circumstances be controlled or modified, give this property to the murderer.

The purpose of those statutes was to enable testators to dispose of their estates to the objects of their bounty at death, and to carry into effect their final wishes legally expressed; and in considering and giving effect to them this purpose must be kept in view. It was the intention of the law-makers that the donees in a will should have the property given to them. But it never could have been their intention that a donee who murdered the testator to make the will operative should have any benefit under it. If such a case had been present to their minds, and it had been supposed necessary to make some provision of law to meet it, it cannot be doubted that they would have provided for it. It is a familiar canon of construction that a thing which

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is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute unless it be within the intention of the makers. The writers of law do not always express their intention perfectly, but either exceed it or fall short of it, so that judges are to collect it from probable or rational conjectures only, and this is called "rational interpretation;" and Rutherford, in his Institute, (p. 407), says: "When we make use of rational interpretation, sometimes we restrain the meaning of the writer so as to take in less, and sometimes we extend or enlarge his meaning so as to take in more, than his words express."

Such a construction ought to be put upon a statute as will best answer the intention which the makers had in view, for *qui haeret in litera, haeret in cortice.* In Bacon's Abridgement (Statutes, 1, 5); Puffendorf (bk. 5, c. 12); Rutherforth (pp. 422, 427) and in Smith's Commentaries (814) many cases are mentioned where it was held that matters embraced in the general words of statutes nevertheless were not within the statutes, because it could not have been the intention of the lawmakers that they should be included. They were taken out of the statutes by an equitable construction; and it is said in Bacon: "By an equitable construction a case not within the letter of a statute is sometimes holden to be within the meaning, because it is within the mischief for which a remedy is provided. The reason for such construction is that the law-makers could not set down every case in express terms. In order to form a right judgment whether a case be within the equity of a statute, it is a good way to suppose the law-maker present, and that you have asked him this question: Did you intend to comprehend this case? Then you must give yourself such answer as you imagine he, being an upright and reasonable man, would have given. If this be that he did mean to comprehend it, you may safely hold the case to be within the equity of the statute; for while you do no more than he would

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have done, you do not act contrary to the statute, but in conformity thereto." In some cases the letter of a legislative act is restrained by an equitable construction; in others, it is enlarged; in others, the construction is contrary to the letter. The equitable construction which restrains the letter of a statute is defined by Aristotle as frequently quoted in this manner: *Aequitas est correctio legis generaliter latae qua parti deficit.* If the law-makers could, as to this case, be consulted, would they say that they intended by their general language that the property of a testator or of an ancestor should pass to one who had taken his life for the express purpose of getting his property? In 1 Blackstone's Comm. 91, the learned author, speaking of the construction of statutes, says: "If there arise out of them any absurd consequences manifestly contradictory to common reason, they are with regard to those collateral consequences void. * * * When some collateral matter arises out of the general words, and happens to be unreasonable, then the judges are in decency to conclude that the consequence was not foreseen by the parliament, and therefore they are at liberty to expound the statute by equity, and only *quo ad hoc* disregard it;" and he gives as an illustration, if an act of parliament gives a man power to try all causes that arise within his manor of Dale, yet, if a cause should arise in which he himself is party, the act is construed not to extend to that, because it is unreasonable that any man should determine his own quarrel.

There was a statute in Bologna that whoever drew blood in the streets should be severely punished, and yet it was held not to apply to the case of a barber who opened a vein in the street. It is commanded in the Decalogue that no work shall be done upon the Sabbath, and yet giving the command a rational interpretation founded upon its design the Infallible Judge held that it did not prohibit works of necessity, charity, or benevolence on that day.

What could be more unreasonable than to suppose that it was the legislative intention in the general

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laws passed for the orderly, peaceable and just devolution of property that they should have operation in favor of one who murdered his ancestor that he might speedily come into the possession of his estate? Such an intention is inconceivable. We need not, therefore, be much troubled by the general language contained in the laws.

Besides, all laws, as well as all contracts, may be controlled in their operation and effect by general, fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime. These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statutes. They were applied in the decision of the case of the *N. Y. Mut. Life Insurance Co.* v. *Armstrong*, 117 U. S. 591, 6 Sup. Ct. Rep. 877. There it was held that the person who procured a policy upon the life of another, payable at his death, and then murdered the assured to make the policy payable, could not recover thereon. Mr. Justice FIELD, writing the opinion, said: "Independently of any proof of the motives of Hunter in obtaining the policy, and even assuming that they were just and proper, he forfeited all rights under it when, to secure its immediate payment, he murdered the assured. It would be a reproach to the jurisprudence of the country if one could recover insurance money payable on the death of a party whose life he had feloniously taken. As well might he recover insurance money upon a building that he had wilfully fired."

These maxims, without any statute giving them force or operation, frequently control the effect and nullify the language of wills. A will procured by fraud and deception, like any other instrument, may be decreed void, and set aside; and so a particular portion of a will may be excluded from probate, or held inoperative, if induced by the fraud or undue influence of the person

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in whose favor it is. (*Allen* v. *McPherson*, 1 H. L. Cas. 191; Harrison's Appeal, 48 Conn. 202.) So a will may contain provisions which are immoral, irreligious, or against public policy, and they will be held void.

Here there was no certainty that this murderer would survive the testator, or that the testator would not change his will, and there was no certainty that he would get this property if nature was allowed to take its course. He therefore murdered the testator expressly to vest himself with an estate. Under such circumstances, what law, human or divine, will allow him to take the estate and enjoy the fruits of his crime? The will spoke and became operative at the death of the testator. He caused that death, and thus by his crime made it speak and have operation. Shall it speak and operate in his favor? If he had met the testator, and taken his property by force, he would have had no title to it. Shall he acquire title by murdering him? If he had gone to the testator's house, and by force compelled him, or by fraud or undue influence had induced him, to will him his property, the law would not allow him to hold it. But can he give effect and operation to a will by murder, and yet take the property? To answer these questions in the affirmative it seems to me would be a reproach to the jurisprudence of our State, and an offence against public policy.

Under the civil law, evolved from the general principles of natural law and justice by many generations of jurisconsults, philosophers and statesmen, one cannot take property by inheritance or will from an ancestor or benefactor whom he has murdered. (Domat. pt. 2, bk. 1, tit. 1, § 3; Code Napoleon, § 727; Mackeldy's Roman Law, 530, 550.) In the Civil Code of Lower Canada the provisions on the subject in the Code Napoleon have been substantially copied. But, so far as I can find, in no country where the common law prevails has it been deemed important to enact a law to provide for such a case. Our revisers and law-makers were familiar with the civil law, and they did not deem it important to incorporate into our statutes its provisions upon this sub-

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ject. This is not a *casus omissus*. It was evidently supposed that the maxims of the common law were sufficient to regulate such a case, and that a specific enactment for that purpose was not needed.

For the same reasons the defendant Palmer cannot take any of this property as heir. Just before the murder he was not an heir, and it was not certain that he ever would be. He might have died before his grandfather, or might have been disinherited by him. He made himself an heir by the murder, and he seeks to take property as the fruit of his crime. What has before been said as to him as legatee applies to him with equal force as an heir. He cannot vest himself with title by crime.

My view of this case does not inflict upon Elmer any greater or other punishment for his crime than the law specifies. It takes from him no property, but simply holds that he shall not acquire property by his crime, and thus be rewarded for its commission.

Our attention is called to *Owens* v. *Owens*, 100 N. C. 240, 6 S. E. Rep. 794, as a case quite like this. There a wife had been convicted of being an accessory before the fact to the murder of her husband, and it was held that she was nevertheless entitled to dower. I am unwilling to assent to the doctrine of that case. The statutes provide dower for a wife who has the misfortune to survive her husband, and thus lose his support and protection. It is clear beyond their purpose to make provision for a wife who by her own crime makes herself a widow, and wilfully and intentionally deprives herself of the support and protection of her husband. As she might have died before him, and thus never have been his widow, she cannot by her crime vest herself with an estate. The principle which lies at the bottom of the maxim *volenti non fit injuria* should be applied to such a case, and a widow should not, for the purpose of acquiring, as such, property rights, be permitted to allege a widowhood which she has wickedly and intentionally created.

The facts found entitled the plaintiffs to the relief

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they seek. The error of the referee was in his conclusion of law. Instead of granting a new trial, therefore, I think the proper judgment upon the facts found should be ordered here. The facts have been passed upon twice with the same result, first upon the trial of Palmer for murder, and then by the referee in this action. We are therefore of opinion that the ends of justice do not require that they should again come in question.

The judgment of the general term and that entered upon the report of the referee should, therefore, be reversed, and judgment should be entered as follows: That Elmer E. Palmer and the administrator be enjoined from using any of the personalty or real estate left by the testator for Elmer's benefit; that the devise and bequest in the will to Elmer be declared ineffective to pass the title to him; that by reason of the crime of murder committed upon the grandfather he is deprived of any interest in the estate left by him; that the plaintiffs are the true owners of the real and personal estate left by the testator, subject to the charge in favor of Elmer's mother and the widow of the testator, under the antenuptial agreement, and that the plaintiffs have costs in all the courts against Elmer.

GRAY, J. (*dissenting*). This appeal presents an extraordinary state of facts, and the case, in respect of them, I believe, is without precedent in this State.

The respondent, a lad of 16 years of age, being aware of the provisions in his grandfather's will, which constituted him the residuary legatee of the testator's estate, caused his death by poison, in 1882. For this crime he was tried, and was convicted of murder in the second degree, and at the time of the commencement of this action he was serving out his sentence in the state reformatory. This action was brought by two of the children of the testator for the purpose of having those provisions of the will in the respondent's favor canceled and annulled.

The appellants' argument for a reversal of the judg-

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ment, which dismissed their complaint, is that the respondent unlawfully prevented a revocation of the existing will, or a new will from being made, by his crime; and that he terminated the enjoyment by the testator of his property, and effected his own succession to it, by the same crime. They say that to permit the respondent to take the property willed to him would be to permit him to take advantage of his own wrong.

To sustain their position the appellants' counsel has submitted an able and elaborate brief, and if I believed that the decision of the question could be effected by considerations of an equitable nature, I should not hesitate to assent to views which commend themselves to the conscience. But the matter does not lie within the domain of conscience. We are bound by the rigid rules of law, which have been established by the legislature, and within the limits of which the determination of this question is confined. The question we are dealing with is whether a testamentary disposition can be altered, or a will revoked, after the testator's death, through an appeal to the courts, when the legislature has by its enactments prescribed exactly when and how wills may be made, altered, and revoked, and apparently, as it seems to me, when they have fully complied with, has left no room for the exercise of an equitable jurisdiction by courts over such matters. Modern jurisprudence, in recognizing the right of the individual, under more or less restrictions, to dispose of his property after his death, subjects it to legislative control, both as to extent and as to mode of exercise. Complete freedoom of testamentary disposition of one's property has not been and is not the universal rule, as we see from the provisions of the Napoleonic Code, from the systems of jurisprudence in other countries which are modeled upon the Roman law, and from the statutes of many of our States. To the statutory restraints which are imposed upon the disposition of one's property by will are added strict and systematic statutory rules for the execution, alteration and revocation of

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the will, which must be, at least substantially, if not exactly, followed to insure validity of performance. The reason for the establishment of such rules, we may naturally assume, consists in the purpose to create those safeguards about these grave and important acts which experience has demonstrated to be the wisest and surest. That freedom which is permitted to be exercised in the testamentary disposition of one's estate by the laws of the state is subject to its being exercised in conformity with the regulations of the statutes. The capacity and the power of the individual to dispose of his property after death, and the mode by which that power can be exercised, are matters of which the legislature has assumed the entire control, and has undertaken to regulate with comprehensive particularity.

The appellants' argument is not helped by reference to those rules of the civil law, or to those laws of other governments, by which the heir, or legatee, is excluded from benefit under the testament if he has been convicted of killing, or attempting to kill, the testator. In the absence of such legislation here, the courts are not empowered to institute such a system of remedial justice. The deprivation of the heir of his testamentary succession by the Roman law, when guilty of such a crime, plainly was intended to be in the nature of a punishment imposed upon him. The succession, in such a case of guilt, escheated to the exchequer. (See Domat's Civil Law, pt. 2, bk. 1, tit. 1, § 3.)

I concede that rules of law which annul testamentary provision made for the benefit of those who have become unworthy of them, may be based on principles of equity and of natural justice. It is quite reasonable to suppose that a testator would revoke or alter his will, where his mind has been so angered and changed as to make him unwilling to have his will executed as it stood. But these principles only suggest sufficient reasons for the enactment of laws to meet such cases.

The statutes of this state have prescribed various ways in which a will may be altered or revoked; but the very provision defining the modes of alteration and

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revocation implies a prohibition of alteration or revocation in any other way. The words of the section of the statute are: "No will in writing, except in the cases hereinafter mentioned, nor any part thereof, shall be revoked or altered otherwise," etc. Where, therefore, none of the cases mentioned are met by the facts, and the revocation is not in the way described in the section, the will of the testator is unalterable. I think that a valid will must continue as a will always, unless revoked in the manner provided by the statutes. Mere intention to revoke a will does not have the effect of revocation. The intention to revoke is necessary to constitute the effective revocation of a will, but it must be demonstrated by one of the acts contemplated by the statute. As WOODWORTH, J., said in *Dan* v. *Brown*, 4 Cow. 490: "Revocation is an act of the mind, which must be demonstrated by some outward and visible sign of revocation." The same learned judge said in that case: "The rule is that if the testator lets the will stand until he dies, it is his will; if he does not suffer it to do so, it is not his will." And see *Goodright* v. *Glazier*, 4 Burrows, 2512, 2514; *Pemberton* v. *Pemberton*, 13 Ves. 290.

The finding of fact of the referee that presumably the testator would have altered his will had he known of his grandson's murderous intent cannot affect the question. We may concede it to the fullest extent; but still the cardinal objection is undisposed of,—that the making and the revocation of a will are purely matters of statutory regulation, by which the court is bound in the determination of questions relating to these acts.

Two cases in this State and in Kentucky, at an early day, seem to me to be much in point. *Gains* v. *Gains*, 2 Marshall, 190, was decided by the Kentucky Court of Appeals in 1820. It was there urged that the testator intended to have destroyed his will, and that he was forcibly prevented from doing so by the defendant in error or devisee; and it was insisted that the will, though not expressly, was thereby virtually, revoked. The court held, as the act concerning wills prescribed

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the manner in which a will might be revoked, that, as none of the acts evidencing revocation were done, the intention could not be substituted for the act. In that case the will was snatched away, and forcibly retained. In 1854, Surrogate BRADFORD, whose opinions are entitled to the highest consideration, decided the case of *Leaycraft* v. *Simmons*, 3 Bradf. Sur. 35. In that case the testator, a man of 89 years of age, desired to make a codicil to his will, in order to enlarge the provisions for his daughter. His son, having the custody of the instrument, and the one to be prejudiced by the change, refused to produce the will at testator's request, for the purpose of alteration. The learned surrogate refers to the provisions of the civil law for such and other cases of unworthy conduct in the heir or legatee, and says: "Our statute has undertaken to prescribe the mode in which wills can be revoked [citing the statutory provision.] This is the law by which I am governed in passing upon questions touching the revocation of wills. The whole of this subject is now regulated by statute; and a mere intention to revoke, however well authenticated, or however defeated, is not sufficient." And he held that the will must be admitted to probate. I may refer also to a case in the Pennsylvania courts. In that State the statute prescribed the mode for repealing or altering a will, and in *Clingan* v. *Micheltree*, 31 Pa. St. 25, the supreme court of the State held, where a will was kept from destruction by the fraud and misrepresentation of the devisee, that to declare it canceled as against the fraudulent party would be to enlarge the statute.

I cannot find any support for the argument that the respondent's succession to the property should be avoided because of his criminal act, when the laws are silent. Public policy does not demand it; for the demands of public policy are satisfied by the proper execution of the laws and the punishment of the crime. There has been no convention between the testator and his legatee; nor is there any such contractual element, in such a disposition of property by a testator, as to impose or

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imply conditions in the legatee. The appellants' argument practically amounts to this: that, as the legatee has been guilty of a crime, by the commission of which he is placed in a position to sooner receive the benefits of the testamentary provision, his rights to the property should be forfeited, and he should be divested of his estate. To allow their argument to prevail would involve the diversion by the court of the testator's estate into the hands of persons whom, possibly enough, for all we know, the testator might not have chosen or desired as its recipients. Practically the court is asked to make another will for the testator. The laws do not warrant this judicial action, and mere presumption would not be strong enough to sustain it.

But more than this, to concede appellants' views would involve the imposition of an additional punishment or penalty upon the respondent. What power or warrant have the courts to add to the respondent's penalties by depriving him of property? The law has punished him for his crime, and we may not say that it was an insufficient punishment. In the trial and punishment of the respondent the law has vindicated itself for the outrage which he committed, and further judicial utterance upon the subject of punishment or deprivation of rights is barred. We may not, in the language of the court in *People* v. *Thornton* (25 Hun, 456, "enhance the pains, penalties and forfeitures provided by law for the punishment of crime."

The judgment should be affirmed with costs.

All concur with EARL, J., except GRAY, J., who reads dissentng opinion, and DANFORTH, J., concurring.

Judgment in accordance with the prevailing opinion.

Murder of Testator by Beneficiary under a Will.—In the case of Owens v. Owens, 100 N. C. 240, which is disapproved in the principal case, it was held that the only criminal misbehavior which bars a wife's right of dower is the commission of adultery and living separate from her husband at the time of his death, and that the widow, although convicted as accessory before the fact to her husband's murder and confined in the state prison

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under sentence therefor, is nevertheless entitled to dower in his lands. It was further held in that case, that forfeiture of property for crime is unknown to the law of North Carolina, and that crime cannot intercept the transmission of an intestate's property to his heirs and distributees, the court saying:

"Is the right of the wife to share in the personal estate as a distributee lost or affected by the fact that the intestate died at her hands or through her procurement? Does the child who slays a parent thereby lose his right to participate with his brothers and sisters in the distribution of the personal or to take his part of the descended real estate? Or, reversing the matter, does the husband who kills his wife impair his right under the Statute of Distributions to succeed to the ownership of her personal property left after payment of debts? Or, in general terms, does anyone, as a consequence of the unlawful taking of human life, become thereby disabled to take a part of the estate left by the deceased, which the law gives him and gives him subject to no such condition? We are unable to find any sufficient legal ground for denying to the petitioner the relief which he demands."...."We have searched in vain for an authority or ruling on this question and find no such case; the fact that none such is met with affords a strong presumption against the proposition (that the crime of the wife would bar her dower) that must therefore determine the appeal upon the reason of the thing."

In the case of the New York Mutual Life Insurance Company v. Armstrong, 117 U. S. 591, cited in the principal case, it was held that proof that the assignee of a policy of life insurance caused the death of the assured by felonious means is sufficient to defeat a recovery on the policy, and that evidence that the assignee of a policy sued upon had obtained other insurance in other companies on the life of the assured, at or near the same time, was clearly admissible, upon the theory that it tended to show that the insurance was obtained upon the premeditated purpose to defeat and defraud the company. See also New York Life Insurance Co. v. Black, 3 Md. 341; Warnock v. Davis, 104 U. S. 775; Archibald v. Mutual Insurance Company of Chicago, 38 Wis. 542; De Ronge v. Elliott, 23 N. J. Eq. 486. *Cf.* Lincoln v. Claflin, 7 Wall, 132; Butler v. Watkins, 13 Wall, 456; Bottomly v. United States, 1 Story, 135.

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HACKNEY *vs.* TRACY.

(137 Pennsylvania State, 53.)

EXECUTORY DEVISE.—FAILURE OF ISSUE.

A gift over to another if the first devisee die without issue, being construed to import an indefinite failure of issue, is void, and the first devisee is vested with the fee.

APPEAL from the Court of Common Pleas of Fayette County. The language of the will is stated in the opinion.

Edward Campbell, (with him *R. H. Lindsey* and *T. B. Searight*), for the appellants.

S. L. Mestrezat, for the appellees.

GREEN, J. In one of our most recent cases *Reinoehl* v. *Shirk*, 119 Pa. St. 108, 12 Atl. Rep. 806, our brother STERRITT, in delivering the opinion of the court, said: "Standing alone, therefore, the words 'die without leaving issue,' and other expressions of the same import, mean an indefinite failure of issue. *Taylor* v. *Taylor*, 63 Pa. St. 481; *Middleswarths* v. *Blackmore*, 74 Pa. St. 414. At common law in the absence of words making a different intent apparent, the established interpretation of such expressions in a will is that they import a general indefinite failure of issue, and not a failure at the death of the first taker; and such has undoubtedly been the rule in this state since *Eichelberger* v. *Barnitz*, 9 Watts, 447."

In the present case, the whole of the devise of the premises in question is in these words: "Fifth. And, at the decease of my wife, Nancy, I give and bequeath the same to my daughter Elizabeth by her paying to my daughter Mary, intermarried with C. V. Tracy, one-half the appraised value, but, in case my daughter Elizabeth should die without issue, then in that case all her interest that she might or could have in the same to descend to my daughter Mary." There are no other words in

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the will that make any other provision, or in any manner relate to this part of the estate. The concluding clause relates to the part devised to William.

In the leading case of *Eichelberger* v. *Barnitz*, 9 Watts, 447, the words of the will were: "And further my will is, because my son Henry is not yet married, that, if he should die without leaving any lawful issue, then his full share shall fall or go in equal shares to my other three children, Adam and Anna, Mary and Susanna, to one of them as much as to the other." SERGEANT, J., said, in delivering the opinion: "The principle has now become a settled rule of property in relation to lands, that if a devise be made to one in fee, and if he die without issue or on failure of issue, or for want of issue, or without leaving issue, then over to another in fee, the estate of the first taker is a fee-tail, which, if he have issue, passes to them *ad infinitum* by descent as tenants in tail. The estate vests in the first taker fully, and to all intents and purposes as a fee-tail; and any devise over after the failure of such must of course be after an indefinite failure of issue, and bad as an executory devise. It is good as a vested remainder, subject to be barred by a fine or recovery, or deed executed by the tenant, in tail, under the act of assembly."

We have repeatedly said that the case of *Eichelberger* v. *Barnitz*, has never been shaken, and it is certainly the law of this state at the present time. There have undoubtedly been cases in which we have held that, where language somewhat similar was used, "the failure of issue, upon which the estate of the first taker was to determine, was a definite, and not an indefinite, failure of issue; but in all of these cases some particular reasons, founded upon language of the will indicating that the testator intended a definite failure of issue, controlled the decision. It was contended for the appellants that such a reason exists in the present case, in the fact that the limitation over is to the sister Mary by name; and that she being a living person at the death of the testator, a definite failure of issue must have been intended; and that such a limitation was not too remote

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to sustain an executory devise. There are cases in which such a fact is held important in connection with other considerations; but, standing alone, it is clearly not sufficient, as has been held in many of the cases. Thus in *Eichelberger* v. *Barnitz* the limitation over was to testator's other three children, Adam and Anna, Mary and Susanna." They were the testator's own children, and were specifically named as second takers, which might be well urged against the failure of issue being regarded as definitive; yet it was so held.

In the case of *Lapsley* v. *Lapsley*, 9 Pa. St. 130, the devise was to four sons equally, they paying a certain sum, which was to be divided among the testator's daughters. The will then provided: "If any of my sons should die without issue, their part or portion shall be divided between the surviving brothers; also, if a daughter should die without issue, her part or portion shall be divided among her remaining sisters." Here also, although the limitation over was to those of the testator's own children who should survive, the case was held to be one of an indefinite failure of issue, and the estate of the first taker was a fee-tail.

The case of *Vaughan* v. *Dickes*, 20 Pa. 509, is still stronger in the same direction, and is strikingly analogous to the present one. The words of the devise were: "And, after the decease of my said wife, I give, bequeath, and devise all the aforesaid real estate, above described, to my son Peter Dickes and daughter Catherine Albertson, to them and their heirs forever, share and share alike, to be equally divided between them; * * * and it is further my will that, should my son Peter Dickes not marry and have lawful issue, then the said real estate heretofore devised to him shall go to my said daughter, Catherine Dickes, and her heirs forever." It was held that the words of the will created an estate tail in Peter, and not a fee with an executory devise in favor of Catherine and her heirs; that the limitation over was void as an executory devise, it being too remote, as being founded on an indefinite failure of issue. The reasoning of Mr. Justice WOODWARD in the opinion

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is conclusive against the argument of the appellant in the present case, and, were it necessary, it would be instructive to repeat it. A brief quotation may be cited: "But this form of expression, like its equivalents, 'if he die before he has any issue,' or 'on a failure, of issue,' or 'for want of issue,' or 'without leaving issue,'—have been adjudged again and again, both in England and this country, to import a general and indefinite failure of issue." And again: "This may not be according to the actual intent of the testator. Doubtless he did not intend to create an estate-tail, but, when a testator used words, without explanation or qualification, in the context, which, according to a settled rule of law, import an estate tail, the legal meaning of the will is to prevail over the actual intention of the testator." It will be noticed in this case also that the second taker was a living child of the testator, but, the words of the will coming within the general language which designates an indefinite failure of issue, the ordinary rule was applied.

The same doctrine was applied to almost precisely similar langugae in *Matlack* v. *Roberts*, 54 Pa. 148. AGNEW, J., says in the opinion, that "a contrary doctrine is not to be derived from *Langley* v. *Heald*, 7 Watts & S. 96; *Eby* v. *Eby*, 5 Pa. 461; *Jessup* v. *Smuck*, 16 Pa. 327; and Duval's Appeal, 38 Pa. 112,—for in each of these cases special expressions are found which lead to the conclusion, a failure of issue within a definite period was intended, and consquently that no tenancy in tail could be inferred." The cases referred to are some of those cited by the appellants in the present contention.

Lawrence v. *Lawrence*, 105 Pa. 335, was another instance where a testator devised land to B. & C. "and their heirs as tenants in common, but, if the said C. should die without leaving lawful issue, then and in that case" his share to go to B., his heirs and assigns, forever; and it was held that C. took a fee-tail. The whole subject was again gone over in an elaborate opinion of Mr. Justice TRUNKEY, and all the arguments in favor of a definite failure of issue were reviewed and

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answered, and the estate of C. was held to be a fee-tail, upon the ground of an indefinite failure of issue.

There is no occasion to extend the discussion. We are clearly of opinion that the present case is ruled by all the decisions we have cited, and that there is no exceptional reason for taking it out of their operation. The act of 1855 converts Elizabeth's estate into a fee-simple.

Judgment affirmed.

See further as to executory devises, Summers v. Smith, 7 Am. Prob. Rep., *supra*, p. 118. *Cf.* Bills v. Bills, 7 Am. Prob. Rep., *supra*, p. 135, and the note; also Halliday v. Strickler, 7 Am. Prob. Rep., *supra*, 212.

NELSON *vs.* POTTER.

(50 New Jersey, 324.)

FOREIGN WILLS.—PROBATE.—CONSTRUCTION.—EXECUTION.—LEX REI SITAE.

The statute of New Jersey (Rev. of N. J. Supp. 775) providing for the probate of foreign wills does not abrogate the rule that devises of realty must be executed according to the law of the state wherein the land lies; but merely renders a transcript of the foreign probate competent evidence, dispensing with proof by the subscribing witnesses.

The courts of one state being without jurisdiction over title to lands in another state, the clause of the federal constitution requiring full faith and credit to be given in each state to the records and judicial proceedings of every other state, does not apply to foreign devises of realty.

ON Certificate upon a feigned issue out of the Court of Chancery.

Argued before Depue, Van Syckel, and Knapp, Justices.

John S. Voorhees, for plaintiff.

A. Q. Keasbey, for defendant.

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DEPUE, J. This suit involves title to certain lands situate in the county of Middlesex, in this state, of which Isaac J. Potter died seized.

The deceased, whose domicile was in California, died May 19, 1885. By his last will, dated November 19, 1884, he devised the residue of his estate, in which the lands in question were included, to two incorporated societies. The plaintiff derived title by conveyance from these societies. The defendant makes title as an heir-at-law of the deceased.

The testator's will was in writing, and signed by him, but not executed by him in the presence of subscribing witnesses. It is admitted that the will was made and executed in compliance with the laws of California, and that under the laws of that state it would be a valid testamentary disposition of lands. It was not made and executed in conformity with the law of this state, which requires all wills to be executed in the presence of two witnesses, present at the same time, who shall subscribe their names thereto as witnesses in the presence of the testator. Rev., p. 1247, § 22. The certificate presents the question whether a will, made and executed by a non-resident testator, in such a manner as by the law of his domicile would be a valid devise of lands, can operate to devise lands in this state, the will not having been executed in conformity with the law of this state.

The incidents of real estate, its disposition, and right of the succession, depend upon the *lex rei sitae*. The validity of bequests of personal property depends upon the law of the testator's domicile, and the validity of devises of real property upon the law of the state where the lands lie. Hence a will executed according to the law of the testator's domicile will pass personal property wherever situate; but, with respect to devises of lands, the will must be executed according to the formalities prescribed by the law of the state in which the land is situated. 4 *Kent. Comm.* 513; *Story, Confl. Law*, § 474; *Whart. Confl. Law*, § 585; *Jones* v. *Habersham*, 107 U. S. 174-179, 2 Sup. Ct. Rep. 336; *Robertson* v. *Pickrell*,

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109 U. S. 608, 3 Sup. Ct. Rep. 407; *Pratt* v. *Douglass*, 38 N. J. Eq. 516; 1 *Jarm. Wills*, (*Rand. ed.*) 1, *and note b.*

The courts of one state are without jurisdiction over title to lands in another state; and the clause of the federal constitution which requires full faith and credit to be given in each state to the records and judicial proceedings of every other state applies to the records and proceedings of courts only so far as they have jurisdiction. *Public Works* v. *Columbia College*, 17 Wall, 521; *Davis* v. *Headly*, 7 C. E. Green, 115-121. Hence the probate of a will in one state, though conclusive as to title to personalty if the probate be made at the domicile of the testator, is of no force in establishing the sufficiency or validity of a devise of land in another state. It can obtain such force only in virtue of some law of the state in which the lands are situate. *McCormick* v. *Sullivan*, 10 *Wheat.* 192; *Darby* v. *Mayer*, 10 Wheat. 465; Watts & Waddle, 6 Peters, 389; *Robertson* v. *Pickrell*, 109 U. S. 608, 3 Sup. Ct. Rep. 407; *Brine* v. *Insurance Co.*, 96 U. S. 627-635. The state legislature might provide that lands within the state should pass by a devise in a will executed according to the law of the state or country in which the testator was domiciled. But an act of legislation of that import would be so extraordinary and impolitic, in its tendency to introduce doubt and uncertainty in the title to lands, that a statute of that similitude would not be allowed that effect, unless such intent was expressed in clear and unequivocal language.

The testator's will was duly probated in the office of the clerk of Tuolumna county, California, May 27, 1885, and an exemplified copy thereof filed and recorded in the surrogate's office of Middlesex county, in this state, May 2, 1887, in compliance with the act of the legislature of May 11, 1886, (Sup. Rev., p. 775.) It is contended by the plaintiff that, by force of this statute, a will, not executed in the manner prescribed by the law of this state, is nevertheless operative to devise lands in this state, if it be executed according to the formalities required for a devise of lands by the laws of the state or country where the testator was domiciled. (The act

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in question provides that when any will shall have been admitted to probate in any state or territory of the United States, or the District of Columbia, or in any foreign state or kingdom, and any person shall desire to have *the same recorded in this state, for the purpose of making title to lands or real estate in this state*, it should be lawful for the surrogate of any county in this state, upon an exemplified copy of such will and of the certificate of probate thereof and of the letters testamentary, exemplified and attested as mentioned in the act, being filed in his office, to record such will, certificate and letters, and file the said copy in his office). The act further provides that *any such will, certificate, and letters, being so recorded, should have the same force and effect, in respect to all lands and real estate whereof the testator died seized, as if the said will had been admitted to probate, and letters testamentary had been issued in this state.* It also provides that all conveyances theretofore or thereafter made by any executor, or by any devisee, *should be as valid as if said will had been admitted to probate, and letters testamentary, etc., had been issued in this state*, and that such record or certified copies thereof should be received in evidence in all courts of this state.

This statute was originally passed March 28, 1866, Nix. Dig. 1035, § 40. It was repealed in 1873, (Pamph. L. 1872, p. 58.) and restored in 1873, (Pamph. L. 1872, p. 168,) and was included in the Orphan's Court act in the Revision of 1874. (Rev., p. 757, § 26.) It was re-enacted with some amendments in 1882, (P. L. 1882, p. 112,) and again in 1866, with some other amendments, Rev. Sup., p. 775;) but the act as it now stands is, so far as concerns this suit, substantially the same as it was when it was passed in 1866. The act, as passed in 1866, was entitled "A supplement to the act relative to the probate of wills from other or foreign states," which was an act passed April 15, 1846, Nix. Dig. p. 1032, § 31. The act of 1846, to which the act of 1866 was a supplement, was originally passed March 6, 1828, under the title of "An act relative to the probate of wills," (Har. Comp.

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195,) and with some additions, of no importance in this case, was included in the Revision of 1846 under the title above mentioned.

When the act of 1828, providing for the record of foreign wills, was passed, statutes were in force making the record of wills originally proved under the laws of this state, either in the Prerogative Court or before the surrogate, or transcripts thereof, competent evidence of the same validity and effect as if the original will were produced and proved. The germ of this legislation was the act of March 17, 1713-14, (Nix. Dig. p. 1034; Revision, 1249;) which in the second section provided that wills thereafter made in writing, signed and published by the testator in the presence of three subscribing witnesses, and regularly proved and entered upon the books of records or registers, should be sufficient to devise and convey lands, tenements, hereditaments, or other estates, as effectually, to all intents and purposes, as if the testator had conveyed the same away in his lifetime; and that the books in which they were registered or recorded should be accepted, and be sufficient evidence at all times and places. The fourth section declared that the copy of any will, made in any of his majesty's colonies, by which any real estate within this colony is devised, being proved according to the custom of such colony, and certified under the great seal of such colony, should be received in evidence in any of the courts within this province, and be esteemed as valid and sufficient as if the original will or testament was then and there produced and proved. This act is still in force (the word "colony" being taken to include "state,"), except as modified by the act concerning will, of March 12, 1851 (Rev., p. 1247,), with respect to the number of witnesses required, and the mode of executing and attesting wills. *Graham* v. *Whitely*, 26 N. J. Law, 254-259; 4 Griff. Law Reg., p. 1241 § 72. Mr. Griffith, commenting on the act of 1713-14, and other provisions for authenticating wills made in other states, as furnishing evidence of the existence and of the probate of such a will in another state, containing

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a devise of land so in this state adds that "still it [the will] must appear to be executed in such manner as our law requires for the devising of real estate lying here." 4 Griff. Am. Reg. p. 1241, § 72, note 1.

None of these acts, which make the record of probate or transcripts thereof evidence, was designed to change the law with respect to the manner in which wills were required to be executed to make a valid devise of lands. When these acts were passed, and down to the act of 1851, a will of personalty was valid, and therefore entitled to probate, though it was executed without any subscribing witnesses; and at the same time a will was inoperative to devise lands, unless executed in the presence of subscribing witnesses, and with certain formalities provided by statutes regulating that subject. The object of these acts was simply to provide instruments of evidence to dispense with the production of the subscribing witnesses in support of title by devise. As was said by Chief Justice BEASLEY. "the intention was to make them *prima facie* evidence for the sake of convenience." *Otterson* v. *Hofford*, 36 N. J. Law, 129-133. If the will, as probated, showed a will executed in such a manner as was required for a valid devise of lands, the record of the probate, or a transcript thereof, was *prima facie* evidence of the title of the devisee. If the record did not exhibit a will so executed, the record or transcript went for naught. *Den* v. *Allen*, 2 N. J. Law, 35, 38, 42, 43; *Allaire* v. *Allaire*, 37 N. J. Law, 312, 318, 319; s. c. 39 N. J. Law, 113.

The act of 1846, which applies to foreign wills, must receive the same construction; for by the third section of that act it is declared that such record, or certified copies thereof, should be evidence in the same manner, and have the same force and effect, as if such will had been proved in the usual manner, under the existing laws of this state. It was so decided in *Allaire* v. *Allaire*, *supra*.

It was contended by the plaintiff, to sustain this devise, that the act of 1886, (Rev. Sup., p. 775,) requires a broader construction. The argument was based upon

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the phrase, "shall desire to have the same recorded in this state for the purpose of making title to lands or real estate in this state," and the fact that conveyances therefore or thereafter made by executors or devisees was validated. The reason for the introduction of the words above quoted, with respect to the purpose for which such will was recorded, is apparent. The act of 1846 contemplated letters testamentary, or administration upon the recording of the will, and required a bond, with security from non-residents, for the faithful administration of the testator's estate. In some instances the record of a foreign will in this state was needed exclusively as a muniment of title, without any administration on the testator's estate. The supplements of 1866 and 1887 were designed to meet this situation of affairs. Provision was therein made for recording the will for the sole purpose of making title to lands or real estate in this state without letters testamentary or of administration thereon, and consequently without any bond for the administration of the testator's estate. And it will be observed that in every instance in these statutes, in which the effect of such a record is declared, it is declared that such will, upon being recorded, "shall have the same force and effect, in respect to all lands and real estate whereof the testator died seized, as if said will had been admitted to probate, and letters testamentary or of administration with the will annexed had been issued in this state;" and that conveyances of such real estate by the executor or devisee, "shall be as valid as if said will had been admitted to probate, and letters testamentary or of administration with the will annexed had been issued in this state." In this language the legislature expressed a purpose to put such a will, when recorded, on the same footing, with respect to lands, as wills recorded under the act of 1866. The language in which these statutes are expressed gives no countenance to the supposition that the legislature intended to suspend the statute concerning wills, with respect to lands in this state, in favor of foreign testators; or to give the record of foreign wills

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an effect which it has not given to domestic wills, duly probated in our courts. The whole of the legislation with respect to the force and effect of the probate and recording of wills, domestic or foreign, upon the title to lands, is of the same character. The record of probate or a transcript thereof is made competent evidence dispensing with proof by the subscribing witnesses; leaving the legal effect of the will, as a devise of lands to be determined as it would be if the original will was produced and proved. The testator's will, if produced and proved, would be inoperative to devise lands in this state. It acquired no additional force from the recording.

A certificate will be made that the title to the lands in question did not pass under the testator's will, but descended to his heirs-at-law.

In preparing this opinion, I have not overlooked the fact that upon the testator's death, in 1885, the lands in question descended to his heirs-at-law, and that their title was vested before the act of 1886 was passed. But inasmuch as the act of 1882, which was in force when the testator died, is, in all respects material to this controversy, identical with the act of 1886, I preferred to consider the case as if controlled by the latest act on this subject.

Will of realty—Personalty—Execution and probate.—In Jones v. Habersham, 107 U. S. 174, it is held that the validity of a charitable devise as against the heir-at-law depends upon the law of the State where the land lies, and that the validity of a charitable bequest as against the next of kin depends upon the law of the State of the testator's domicile. The court, by Mr. Justice Gray, said;

"According to the uniform course of the decisions of this court, the validity of these devises as against the heir-at-law depends upon the law of the State in which the lands lie, and the validity of the bequests as against the next of kin upon the law of the State in which the testatrix had her domicile. Vidal v. Girard, 2 How. 127; Wheeler v. Smith, 9 How. 55; McDonough v. Murdock, 15 How. 367; Fountain v. Ravenel, 17 How. 369, 384, 394; Perin v. Carey, 24 How. 465; Lorings v. Marsh, 6 Wall. 337; U. S. v. Fox, 94 U. S. 315; Kain v. Gibboney, 101 U. S. 362; Russell v. Allen, 107 U. S. 163."

The later case of Robertson v. Pickrell, 109 U. S. 608, is to the same effect, the court holding that, in order to pass real estate sit-

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uated in the District of Columbia, a will must be executed as provided by the laws in force there, and that its validity must be established in the manner provided by those laws, so that the probate of a will in the District of Columbia is evidence of its validity only so far as it affects personal property.

See further as to foreign wills and comity between the States Toronto General Trust Co. v. Chicago B. & Q. R. Co., 7 Am. Prob. Rep., *supra*, 294; and Lincoln v. Perry, 7 Am. Prob. Rep., *supra*, 289.

In re SWINBURNE.

(16 Rhode Island, 208.)

CONSTRUCTION.—CLERICAL MISTAKE.—"TO" FOR "OF." CONDITIONS.—DIE LEAVING NO LEGAL HEIRS.—DESCRIPTION OF DEVISEES.—PER STIRPES.

A will directed: "All the rest of my estate I give and bequeath to R, * * * the legal heirs of B., and of T., M. S., M. C., E., and C., and S., share and share alike, to them, their heirs and assigns, forever. Should either of my above-named children die, leaving no legal heirs born of their own body, then I give their shares, after their death, to my then living heirs." B. died before the testator's death. *Held*, that the words "of T." were used, by clerical mistake, instead of "to T," the words, "Should either of my above-mentioned children die leaving no legal heirs born of their own body" and the words following, "I give their shares after their death" clearly importing that T. was not excepted from the provisions of the will.

The words, "die, leaving no legal heirs born of their own body," are not to be construed, "die, before the testator, leaving no legal heirs born of their own body;" the words following, "I give their share after their death," indicating that the testator contemplated a period before their death during which they might enjoy their share, and intended, by the words "after their death," that the bequest over should take place immediately after their death.

The intention of the testator to have the two children of his deceased son B. take *per stirpes* is manifested by his use of the words, "legal heirs of B." in designating them; and this construction, being in harmony with the entire structure of the bequest, should take effect, notwithstanding the use of the expression "share and share alike."

CASE stated for an opinion of the court under Pub. St. R. I. c. 192 § 23, which is as follows: "Any persons interested in any question of the construction of

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any statute of this state, or any will, deed, or other writing, * * * or as to any other matter or thing within the jurisdiction of a court of equity, may concur in stating such question in the form of a special case for the opinion of said court; * * * and the court, on hearing the case, may declare its opinion of the rights involved therein without administering any relief; and such declaration shall have the same effect, as to all the parties thereto, as if contained in a decree on original bill."

Francis B. Peckham, for petitioner Swinburne.

DURFEE, C. J. The case stated is this: Benjamin Mumford, late of Newport, died in July, A. D. 1880, leaving a will which was duly admitted to probate. The will, besides other bequests and provisions, bequeathed four United States bonds, of the par value of $8,000, to Lewis S. Simmons, in trust, to pay the interest accruing thereon to the testator's widow during her natural life. It also provided that, if the widow should choose to occupy his homestead, she should be allowed to do so at a low rent, not exceeding $200; and disposed of the residue of the estate in the words following, to wit:

"All the rest of my estate I give and bequeath to Rebecca G. Knox, widow, of Waterloo, N. Y., the legal heirs of Benjamin Goddard Mumford, of Providence, and of Thomas C. Mumford, also of Providence, Mary S., wife of James Lawton, of Laconia, N. H., Martha C., wife of George W. Swinburne, Elizabeth R., widow of John Sterne, and Catherine T. Mumford, of Newport, and Sarah S. wife of A. Harwood Bacon, of Detroit, Mich., share and share alike, to them, their heirs and assigns, forever. Should either of my above-named children die, leaving no legal heirs born of their own body, then I give their shares, after their death, to my then living heirs, none receiving more than the income of my property during the life-time of the said Louisa B. Mumford."

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Louisa B. Mumford was the testator's widow.

At the time the will was made, the testator had seven children, viz., Rebecca G. Knox, Thomas C. Mumford, Mary S. Lawton, Martha C. Swinburne, Elizabeth R. Sterne, Catharine T. Mumford, and Sarah P. Bacon, all of whom survived the testator and his widow. He had had a son, Benjamin Goddard Mumford, who died before him, leaving two children who survived him and the widow. Rebecca G. Knox, Thomas C. Mumford, Mary S. Lawton, Martha C. Swinburne, and Sarah P. Bacon had children living when the will was made and when the testator died. The widow died in January, A. D. 1887. The following questions are presented for decision, to wit:

First, whether the words "of Thomas C. Mumford," contained in the residuary clause, are not to be construed "to Thomas C. Mumford"; the word "of" being written, instead of "to," by clerical error.

Second, whether the words "die, leaving no legal heirs born of their own body," are to be construed, "die before the testator, leaving no legal heirs born of their own body"; and whether, upon the death of the widow, the executor was authorized and directed to distribute the residue to such of the testator's children as were living at his death, and to the heirs of the son who had predeceased him, or whether the heirs of the body of such of the children as died before the widow are entitled to their shares, and the rest is to be held in trust to be divided at the death of each of the other children.

Third, what share of the residue did the two children of Benjamin Goddard Mumford take under the will?

We think it is evident that "of" was used instead of "to" in the residuary clause at the place indicated by the first question. This appears from the words of the following sentence: "Should either of my above-named children die, leaving no legal heirs of their own body, then I give their shares, after their death, to my then living heirs." The words clearly import that

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all the children were to have their shares until their death, Thomas C. not excepted.

We do not think the words "die, leaving no legal heirs born of their own body," are to be construed, "die *before the testator*, leaving no legal heirs born of their own body." There is nothing in the context to warrant such a restriction; and the words "I give their shares after their death," show that the testator contemplated a period before their death during which the child or children designated would or might enjoy their shares. It follows that the bequest over is a bequest which may still take effect in case any of the children die without leaving any legal heirs born of their own body, unless the language is to be construed as signifying an indefinite failure of issue, and not simply a failure to leave issue living at the death of the first takers. We think the testator had in mind the latter kind of failure. The language is: "Should either of my above-named children die, leaving no legal heirs born of their own body, then I give their shares, *after their death, to my then* living heirs." It seems to us that "after their death" obviously means immediately after their death, not an indefinite length of time afterwards; the words being introduced to fix definitely the time at which the bequest over is to take effect. And see *Pinbury* v. *Elkin*, 1 P. Wms. 563; *Wilkinson* v. *South*, 7 Term R. 553; *Trotter* v. *Oswald*, 1 Cox, 317—which so hold.

The bequest over is an executory bequest; and, in the event of any of the children dying without issue living at his or her death, it will carry his or her share to the testator's then living heirs. 4 Kent, Comm. (12th Ed.) *278, note; 2 Jarm. Wills, (5th Amer. Ed. by Randolph and Talcot,) 485, note; *Norris* v. *Johnston*, 17 Grat. 8; *Jones* v. *Miller*, 13 Ind. 337. It is argued that the words, "none receiving more than the income of my property during the life-time of the said Louisa B. Mumford," imply that the legatees are to receive the principal at her decease. But the words are connected with the bequest over; and it may be argued that with

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as much, if not greater, probability that they were used by way of precaution to make it clear that the bequests over were, like the primary bequests, subject to the widow's life interest so long as she lived.

The will contains the following clause, to wit: "The estate standing in my name in the city of Detroit, Mich., is mine only so far as its cost, and the interest at six per cent. which may be due at the time of my decease, which amount she will furnish my executor, and he will deed the same to my daughter, Sarah P., wife of A. Harwood Bacon, when the division of my estate is made, if not before." It is argued that this indicates an expectation on the part of the testator that Mrs. Bacon would take her share absolutely in the division, and could use it in paying for the estate in Detroit. We recognize the force of this argument, but, nevertheless, we think the inference from the clause is too indecisive to control.

We think, therefore, that the only persons who are at present entitled to have their shares of the residuary personalty delivered to them in full are the two children of Benjamin Goddard Mumford, and the issue of such of the testator's other children as may have died, and that the executor should retain the rest, except personal articles which can only be enjoyed by use, to answer the bequests over, paying the income, meanwhile, to the legatees to whom the shares are primarily given, and, as they severally die, dividing the principal according to the will.

We think the two children of Benjamin Goddard Mumford take together, under the will, a single share, as representing their father. They are mentioned not as children, but as "heirs,"—a word which carries in itself the idea of succession to the right or place of the ancestor. *Balcom* v. *Haynes, and others*, 14 Allen, 204, 205. The manner of this mention, too, among the children of the testator, indicates that they were intended to count representatively as one of the children. *Tillinghast, Executor*, v. *Cook*, 9 Metc. 143; *Daggett* v. *Slack*, 8 Metc. 450; *Clark* v. *Lynch*, 46 Barb. s. c. 68;

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Ricks v. *Williams*, 1 Dev. Eq. 3. The words "share and share alike" are the only words which cause us any difficulty; for these words, and the words "equally," "equally between them," and "to be equally divided between them," have been often construed to call for an equal division among all the persons entitled. But as was remarked in *Balcom* v. *Haynes, and others, supra*, such a construction is not necessary, since the words "may be satisfied by being applied to the division between the classes, and not to that between the individuals." In that case the testator gave a residue to his living brothers and sisters naming them, and to the heirs of a deceased sister, "to be divided in equal shares between them"; and it was held that the heirs of the deceased sister took *per stirpes*. It is true that in the same will the testator gave a pecuniary legacy to "the heirs" of said sister, and the court seized upon that as an aid to the construction, but it was clearly not worth much as an aid. In *Wintermute's Ex'rs* v. *Snyder's Ex'rs* 3 N. J. Eq. 489, the testator bequeathed a part of his estate to "be divided, share and share alike, between the heirs of Joseph Snyder, deceased, William Snyder and his heirs, and Peter Snyder and his heirs." And the court held that "he meant that the heirs of Joseph, who was dead, should represent their father, and take one share among them, and that Peter and William should take the other two." So in *Roome* v. *Counter*, 6 N. J. Law, 111, where the bequest was to be equally divided among several children and "the heirs of my son Peter," it was decided that the children of Peter should take *per stirpes*. See, also, *Spivey* v. *Spivey* 2 Ired. Eq. 100; *Burgin* v. *Patton*, 5 Jones, Eq. 425; *Bassett* v. *Granger*, 100 Mass. 348; *Rand* v. *Sanger*, 115 Mass. 124; *Holbrook, Executor*, v. *Harrington*, 16 Gray, 102; *Talcott* v. *Talcott*, 39 Conn. 186; *Raymond* v. *Hillhouse*, 45 Conn. 467. It seems to us that the intention of the testator to have the children of his son Benjamin take representatively, as a unit, rather than individually, is too clearly manifested by the significant choice

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of the words "legal heirs" to designate them, and by the entire structure of the bequest, for us to allow the words "share and share alike" to control. Under such a construction, the words are applicable as we have above seen; and, moreover, it should be considered that they are formal words, which are usually intended not so much to direct equality between the legatees as to donate an intent to have the legatees take as tenants in common, instead of as joint tenants.

Decree accordingly.

SUCCESSION OF ARMANT.

(43 La. Ann. 310.)

OLOGRAPHIC WILL—SUFFICIENCY OF EXECUTION—SIGNATURE.

The olographic, like every other, testament, is a solemn act, depending for its validity upon compliance with the forms prescribed by law; and, however clearly it appears that the decedent intended the instrument to be her will, if it is not clothed with the forms prescribed it cannot stand.

An olographic testamentary writing containing the caption, "Testament d'Aglae Armant," but without signature at the end or following the testamentary dispositions, does not import such a signature as is required under the historical and rational interpretation of article 1588 of our Code.

Article 1588 was copied into our Code from article 970 of the French Code, which in turn had been taken from an ordinance of Louis XV. prescribing the forms of the olographic testament. Prior and subsequent to the Code Napoleon, the jurisprudence of France has been uniform to the effect that the signature must be at the end of the testament, or, at least, that no dispositions following the signature can have effect.

This jurisprudence was extant and well known when the framers of our Code adopted our article. It must be presumed that they intended it to receive the same interpretation, which, moreover, correspond to the common understanding and to the standard definition of the meaning of the word "*signature*."

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A contrary interpretation of a like provision in the English statute of Frauds, by certain English and American courts, was so much criticised by sound legists that the statute was amended so as expressly to require the signature to be at the bottom of the testament.

We are moreover satisfied, in this case, that the name, as written in the caption, was not intended to be a signature, but that her belief that the instrument was her will was simply based on her ignorance that a signature was necessary.

The other ground assumed in support of the instrument as a will is inconsistent with the foregoing, and is, besides, unsupported by proof.

APPEAL from district court, parish of St. James; DUFFEL, J.

T. J. Semmes & Legendre, for appellant—The signature of the testator to an olographic will need not be at the foot of it; it may be at the top or in the body of the instrument. *Lemoyne* v. *Stanley*, 3 Lev. 1; *Wright* v. *Wright*, 7 Bing. 457; *White* v. *Trustees*, 6 Bing. 316; *Mills' Case*, 4 Dana, 1; *Selden* v. *Coalter*, 21 Vt. 264; *Adams* v. *Field*, 2 Va. Cas. 553; Dalloz, No. 2729; Pasicrisie, 1863, 2, 333.

The order of formalities prescribed in article 1588 of the Code is sacramental. *Succession of Fuqua*, 27 La. Ann. 273.

The same rule applies to commercial paper. It is not necessary that the signature of the maker of a note or drawer of a draft be at the bottom of it. It may be in any part of the paper, at the top as well as at the bottom. Rand. Com. Paper, § 65; Byles, Bills § 87, Bayley, Bills, § 11.

Sims & Poche, for appellee—1. The paper writing offered for probate as the last will of the deceased is a nullity. It was never signed by her. The other paper writing, styled a "codicil," is likewise a nullity. The witnesses thereto are all women, and none of the formalities required by law for nuncupative wills, under private signature, were complied with. Civil Code, arts. 1570, 1581, 1582, 1591.

2. The formalities prescribed by law for the execu-

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tion of testaments are sacramental; they must be observed strictly on pain of nullity. Id. art. 1595; 31 La. Ann. 318.

3. The testimony of the three witnesses with reference to verbal statements made by the deceased concerning her final dispositions was clearly inadmissible. Wills or testaments cannot be made by parol. Civil Code, art. 1576. The objections set forth in the bills of exceptions to the judge's ruling admitting that testimony, are again urged.

4. The pretension that the deceased had signed the alleged will, but that her signature was subsequently cut off, is not supported by a single fact in the record. All the letters and receipts of deceased in evidence, and which we have attached, by consent, since the case was submitted, show that deceased did not always write her name with an accent over the letter "e," and sometimes she did not even write her first name in full, but signed herself thus: "A. Armant." An examination of those letters and receipts will demontrate that, wherever an accent occurs over the letter "e" in Aglae, it would have been a physical impossibility to cut off the signature without also destroying all trace of the accent. In a number of instances there is no accent over the "e," and this is notably the case with respect to the name of the deceased as it appears at the top of the first page of the alleged will.

5. Even if there were evidence to create even a suspicion that the signature had been cut off, the presumption would be that the deceased mutilated it *animo revocandi.* 35 La. Ann. 402.

FENNER, J. "Testament d'Aglae Armant." Such is the caption appearing at the beginning of an olographic writing containing testamentary dispositions, and offered for probate as a will, but without any signature at the end; and the question is, does this caption import such a signature as is required to an olographic testament? Before the adoption of the Na-

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poleon Code, an ordinance of Louis XV., provided that olographic statements should be entirely written, dated, and signed in the handwriting of him or her making them."

Under this provision the jurisprudence of France required, in the language of Pothier, that "la signature doit etre a la fin de l'acte, parcequ'elle en est le complement et la perfection; c'est pourquoi un *post-scriptum* apres signature est nul, s'il n'est pas aussi signe." Poth. Don. & T. c. 1, art. 2, § 2. Thus interpreted, the same provision passed into the Napoleon Code. The commentators on the Code and the French tribunals have uniformly adopted the same interpretation. The only exception made (and that by divided opinion) is that the *date* may follow signature, and that words written after the signature which are superfluous may be disregarded. Thus in the case of Veuve Guyot, the will ended thus: "Fait par moi, Pauline d'Espinose, Veuve Guyot, qui ai signe apres la lecture et meditation." The court maintained the will on the ground that the name was intended as a signature, and that "the two lines which follow the signature can have no influence on the form of the testament, which was perfect when they were written." Jour. du Palais, 20th April, 1812. It is useless to cite the French commentators; they all agree that testamentary dispositions following the signature are invalid.

The following is a summary of the French doctrine and authorities, as given by an annotator of the Code: "Although the natural place of the signature be at the end of the act, because it expresses the final approval given by the testator to the dispositions of last will which he has made, it is, however, admitted that the writing by the testator of his name toward the end of the act may be considered as a signature, if it is placed after all the dispositions constituting the testament. It does not matter that after the name there may follow some words connected with it, if the words thus following are superfluous or useless"; quoting Cassation, 20 April, 1813. Merlin, Rep. ver-

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bo "Signature," § 3, art. 7; Toullier on Article 970, Fr. Code; Marcade on Article 970, Fr. Code; 4 Demante, No 115; 4 Masse & Verge, p. 96, § 438; 7 Aubry & Rau, p. 108, § 668; Vazeille on Article 970, No. 4; 2 Grenier & Bayle, No. 228; 4 St. Espes-Lescot, No. 1010; 21 Demolombe, No. 114, Coin. Delisle, Art. 970, No. 42; 3 Troplong, No. 1494; 13 Laurent, No. 227. See, also, Cross on Successions, who takes the same view.

Marcade, who is as liberal as any, in commenting on a testament ending thus, "Fait et signe par moi, Michel Francois Falla, le 20 Dec., 1809," says: "The question must be determined according to the circumstances of fact. If the names are accompanied with the ordinary paraph of the party, if, having no paraph, the party has taken care to write the name in more pronounced character than the rest of the writing; if the name, though written in like character, is that of a party whose acts generally have been signed in ordinary writing, and by placing the name in the body of the concluding phrase—one might say that it was a signature, and that the testament was valid. But if, on the contrary,the name thus written was without a paraph, and in no manner distinguished from the rest of the writing, and comes from a party who has always attached to his acts an independent signature, one would say this was not a signature." 4 Marc. p. 10. Applying these tests, we find that the name of this testatrix is written without a paraph, though the evidence shows that she usually, but not universally, employed one; that the name is written without any distinctive characteristics; and that, as appears from every document produced, she invariably attached an independent signature at the end. Moreover, it seems to us, that the coupling of the "d" with the name, in itself excludes the idea of its being intended as a signature.

Thus, under French jurisprudence, this will would fall for two reasons: (1) because the writing of the name was not intended as a signature; (2) because, whether so intended or not, the signature was not at the end of the act.

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This jurisprudence was extant and well established when, in 1825, the article of the French Code was copied into our own. We think it to be a fair presumption that the framers of our Code, familiar with the interpretation of the same language, both prior and subsequent to the Napoleon Code, must have intended and expected that our own article should receive the same interpretation, particularly as it conforms to the common and customary meaning attached to the word "*signature*," as well as to the definitions thereof in all standard dictionaries.

Why should we depart from it?

It is true that, in interpreting a like provision of the first English statute of Frauds, an English court held that writing the name at the beginning of the testament supplied the absence of signature at the end; and some other courts, with that subjection to precedent which characterizes that system, followed the decision. But, though following it, some of the judges intimated that, if it were *resnova*, they would decide differently, and the doctrine was condemned by sound legists. Dr. Browne in his work on Civil Law, and Dr. Christian in his edition of Blackstone, criticise it severely. 1 Browne, Civil & Adm. Law, p. 278, note 16.

And such was the prevalent dissatisfaction that an act of Parliament was passed to amend the statute so as expressly to require the signature to be *at the bottom* of the testament.

We were, at first, much impressed with the clear proof made that the deceased *intended* this paper to be her testament. But there is no more doubt that she *intended* the invalid nuncupative codicil to be her testament; yet, as the latter was attested by women who are incompetent testamentary witnesses, no one claims its validity. And so, if the olographic will is not signed as required by law, her intentions cannot save it.

The question is not whether she *intended* this paper to be her will, but whether it *is* a will clothed with

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the forms of law. An olographic, like every other, testament is a *solemn act.* It matters not how clearly it conveys the last wishes of the decedent; if it is not clothed with the forms prescribed, it is null. Even apart from the names not being at the end of the testament, we think the proof does not show that she intended to sign at all. It simply shows that she did not think or know that a signature was essential. If she had known that it was necessary that the testament should be *signed,* it is impossible to conceive how, in so important a matter, she should have acted so ambiguously and so differently from the course universally pursued by her in signing other acts and documents of every description. The simple fact is, she did not know a signature was necessary, and therefore did not sign. Her mistake, in this respect, is unfortunate, in the interests of justice, but it cannot save the will.

The remaining contention of appellant, that the testatrix had signed the will at the end of the act, and that her signature had been cut off by some third person, is so inconsistent with the one just disposed of that it hardly lies in the mouth of appellant to urge them both. But, moreover, it is unsupported by proof, and has nothing to rest on.

Judgment affirmed.

HOWE *vs.* WILSON.

(91 Missouri, 45.)

CHARITIES. — CERTAINTY OF BENEFICIARY. — DISCRETION OF EXECUTOR.

A bequest as follows:—"I direct said Wilson (the executor) to divide said remainder among such charitable institutions in the city of St. Louis, Mo., as he shall deem worthy,"—is sufficiently definite, and will be carried into effect.

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APPEAL from the Circuit Court of St. Louis.

Miles & Flitcraft, for plaintiff in error.

E. C. Elliott, for defendant in error.

BLACK, J. The petition in this case contains two counts. The first is an action at law to contest the validity of the will of James W. Handfield. On this count there was a trial which resulted in a judgment sustaining the will. The second count is in the nature of a bill in equity to have a clause of the will declared void for uncertainty. A demurrer to this court was sustained, and to reverse the judgment sustaining the demurrer, and dismissing the petition, the plaintiff sued out this writ of error.

From the petition it appears the plaintiff is the only heir of Elizabeth Handfield, who died in 1882. She was the widow and only heir of James W. Handfield, who died in 1881. The will was duly probated at the death of Mr. Handfield. It is set out in full, and in substance is as follows; The testator enumerates the property of which he is possessed, which is wholly personal property, all of which is bequeathed to Alexander Wilson in trust for the sole use of Elizabeth Handfield, wife of the testator. Directions are then given the trustee as to the management of the property, with power in him to apply the interest and income, and to use from the principal if needed for her support, and at her death to provide a suitable burial. The trustee is required to buy a cemetery lot for the burial of the testator and his wife, and to reserve sufficient funds to keep the graves in good condition. There is then the following provision: "If there should be a remainder after such sums are provided for after the death of my said wife, I direct said Wilson to divide said remainder among such charitable institutions of the city of St. Louis, Missouri, as he shall deem worthy." Wilson is made executor of the will, qualified as such, and the estate is alleged to consist of property valued at five or six thousand dollars.

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The law is well settled that the courts of this state have jurisdiction over the subject of charities, charitable devises, and bequests. *Chambers* v. *City of St. Louis*, 29 Mo. 543; *Academy of Visitation* v. *Clemens*, 50 Mo. 167; *Schmidt* v. *Hess*, 60 Mo. 591; *Baptist Church* v. *Robberson*, 71 Mo. 326; *Russel* v. *Allen*, 107 U. S. 163, 2 Sup. Ct. Rep. 327. The jurisdiction is not dependent upon St. 43 Eliz. c. 4; for it is not conceded that courts of chancery had an inherent jurisdiction over charities before the enactment of that statute. That the statute in so far as it declares what were existing charities, has had an influence in many of the states, this state not excepted, must be conceded, though the details are wholly inapplicable here. We have no statute which undertakes to exercise the prerogative power of the king over those charities which did not come within the ordinary jurisdiction of the courts, and hence with us some charities will fail which would not fail in England.

Coming, then, to the question in dispute in this case, two things are to be kept in view which render it unnecessary to examine a number of cases cited by the plaintiff. In the first place, the bequest is for charitable institutions. The testator must be taken to have used the word "charitable" in its legal signification. No question, then, can arise as to the character of the bequest. The trustee has no power to dispose of the fund for any purpose other than that strictly charitable. In the next place, there is a living trustee in whom the testator vested the power to divide the fund among such institutions as he should deem worthy. Though the institutions are not designated, yet the means of designating them is provided, and there is no claim that the trustee refuses to act. The case concedes that he will discharge the duty imposed upon him. The question, then, is, with the bequest purely charitable, and a trustee with power to execute it, is it void for uncertainty?

Mr. Perry says: "There is a wide distinction between a gift to *charity*, and a gift to a *trustee* to be by *him* applied to charity. In the first case, the court has only to give the fund to charitable institutions, which

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is a ministerial or prerogative act; in the second case, the court has jurisdiction over the *trustee*, as it has over all trustees, to see that he does not commit a breach of his trust, or apply the funds in bad faith, or to purposes that are not charitable. * * * The courts in America have generally declined, in the absence of legislative authority to administer these indefinite gifts to charity or religion or education or public utility unless there was a trustee appointed by the testator to exercise his discretion in applying the gift to particular objects or persons." Perry, Trusts, § 719.

In *Chambers* v. *City of St. Louis*, *supra*, the devise was: "In trust to be and constitute a fund to furnish relief to all poor emigrants and travelers coming to St. Louis, on their way, *bona fide*, to settle in the west." That devise was held valid, and sufficiently valid and certain, after an elaborate and thorough investigation of the subject. There, it is true, a class of persons was selected to receive aid from the fund; here charitable institutions, within a limited and definite locality, are selected. We do not see that the difference affects the application of any principle upon which that case was decided. The more recent case of *Schmucker's Estate* v. *Reel*, 61 Mo. 592, does not in the least conflict with *Chambers* v. *City of St. Louis*, *supra*, or with anything before stated in this opinion. In that case it clearly appeared that the executor took the bequest clothed with a trust for specific and definite purposes known to the executor, but not defined or stated in the will. As to the purpose not stated, it was as if no will had been made. The principal question in the case has no relevancy here whatever.

In *Saltonstall* v. *Sanders*, 11 Allen, 446, the testator gave the residue of his estate to his executors as trustees to hold and invest the same, and the income, in such manner as might to them seem expedient, and, among other things, "in aid of objects and purposes of benevolence or charity, public or private." The conclusion was reached, both upon principle and authority, that a bequest for "objects and purposes of charity,

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public or private," was a valid charitable gift. It is to be observed the word "benevolence" was used in connection with the word "charity." This gave rise to a further discussion, about which we are not called upon to express any opinion in this case. In this case we have endeavored to show, at the outset, that the bequest is to charity only.

In *Miller* v. *Teachout*, 24 Ohio St. 525, the will contained the following clause: "I direct that my said executor shall appropriate and use all the residue of my estate for the advancement and benefit of the Christian religion, to be applied in such manner as in his judgment will best promote the object named." It is there suggested that, if the objects of the trust had not been aided by further provisions, the validity of the bequest might well be questioned. The gift was held to be valid, however, because the testator had invested the executor with power to specify the particular use of the fund, and all objections because of uncertainty were thereby removed.

It is essential to a charitable bequest that the objects to be benefited should be, to some extent, indefinite; or, as said in *Fountaine* v. *Ravenel*, 17 How. (U. S.) 384: "It is no charity to give to a friend. In the books it is said that the thing becomes a charity when the uncertainty of the recipient begins." The foregoing examples will serve to show that if the general objects of the bequest are pointed out, or if the testator has fixed a means of doing so by the appointment of trustees with that power vested in them, then the gift must be treated as sufficiently definite for judicial cognizance, and will be carried into effect. Perhaps the rule may be stated more favorably to the validity of the trust. Perry, Trusts, §§ 720,732.

But we have no occasion to go any further in this case. Here the testator has provided a means for making that certain which otherwise might appear to be uncertain. We see no difficulty in upholding the gift in this case. It comes fairly within that class of charities where the courts can and will direct the trustee to carry out the will of the testator.

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The judgment is therefore affirmed. BRACE, J., absent. The other judges concur.

Charitable devises and bequests —Statute of 43 Eliz. Chap. 4.—Uncertainty.

In the case of Schmucker's Estate v. Reel, 61 Mo. 592, cited in the principal case, there was an absolute bequest to Reel, as follows:

"I give and bequeath to John H. Reel two hundred dollars to be applied to a specific purpose which I have explained to him.

"Second. I give and bequeath to John H. Reel the sum of five hundred dollars for another and specific charitable purpose which he well understands.

"Third. The balance of my property, of every description, I give, devise and bequeath to John H. Reel, to apply in charity according to his best discretion, and I appoint said John H. Reel executor of this my will."

It further appeared in the will that Reel was to apply the moneys bequeathed to him in certain charities previously explained to him by the testator, and, among other things, that he had delivered to him a written memorandum, as follows:

"After I am dead, I would like you, if you please, to bestow, to be equally divided among the German Roman Catholic churches of St. Louis for masses for myself and wife, five hundred dollars," and that it was to this he referred in the provision of his will quoted above. The court held that such a memorandum, taken as part of the will, constituted a secret trust, and that it was in evasion of a provision of the State Constitution and in fraud of its provisions. It was further held that a bequest to be applied in charity, according to the best discretion of the devisee, will fail for uncertainty of purpose, and that a trust may be so vague and indefinite as to be ineffectual as a trust, but that if it clearly appeared that the trust was intended, the legatee may take a beneficiary interest.

In Miller v. Teachout, 24 Ohio St. 525, cited in the principal case, the court, in construing the following provision:

"I direct that my said executor shall appropriate and use all the residue of my estate for the advancement and benefit of the Christian religion, to be applied in such manner as in his judgment will best promote the object named,"

said:

"Although the power of the courts of this State to devise a scheme for the application of a vague charity may well be questioned, it does not follow that the testator cannot create an agency to do it for him; and it may be regarded as settled that where a testator, creating a trust to a charitable use, defines the intention of the trust and invests the trustee with discretionary power over the application of his bounty to the objects or for the purposes intended, the bequest will not be held invalid so long as there is no obstacle to the exercise of the power confided to the trustee, for the exercise of

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the power may relieve the bequest of all objections arising out of its vague and indefinite character. Trustees of the McIntyre Poor School v. Zanesville Canal and Mfg. Co., 9 Ohio, 287; 17 Ohio St. 352; Urmey v. Wooden, 1 Ohio St. 160; Grimes v. Harmon, 35 Ind. 198; Going v. Emery, 16 Pickr. 107. Nor does it make any difference in this respect whether the trust be of a mere administrative character in the hands of the executor, or whether it be confided to another. In either case the will of the testator may be ascertained and made certain by those to whom he has entrusted discretion and power for that purpose, and their acts may be justly regarded as the definite expression of his own purpose. Beekman v. Bonsor, 23 N. Y. 298; Fountain v. Ravenel, 17 How. 369; Moore v. Moore, 4 Dana, 354."

See generally as to charitable uses: Stratton v. Physio-Medical College, 7 Am. Prob. Rep., *supra*, p. 55, and the cross-reference note thereto; Bullard v. Chandler, 7 Am. Prob. Rep,. *supra*, p. 191.

SITES *vs.* ELDREDGE.

(45 New Jersey Equity, 632.)

POWERS.—INFANCY.—PARTITION.

A power of sale annexed to a devise of the fee, to be exercised at the discretion of the devisee, and without designating any particular object for which it should be exercised, expires at the death of the devisee.

An infant party defendant to a suit in partition is, in the absence of fraud, as much bound by the decree made therein as an adult.

A will in the following words: "I give and bequeath to my wife, Jeannie H. Eldredge, all my real and personal estate, consisting of clothing, jewelry, money, and all the instruments, desks, office appurtenances, and other property of like nature now belonging to me, and purchased prior to May 1, 1884, and now in the office of the firm of Sites & Harrison,"—held to pass title to all the testator's real estate.

BILL for specific performance in the Court of Chancery of New Jersey. Heard on bill, answer, and written statement of admitted facts.

Mr. Wm. R. Barricklo, for the complainant.

Mr. Willard C. Fisk, for the defendant.

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PITNEY, V. C. The defence in this cause is rested wholly upon an alleged defect, or, rather two defects, in the complainant's chain of title. The chain of title submitted reaches back to one William Jewett, the elder, who died in 1874, and who, by his will, devised the lands in question to his son, William S. L. Jewett, in fee simple, and also gave to his executor a general power of sale, and appointed his son sole executor. He gave his wife the use of a house and grounds other than those in question, and also an annuity of $500 a year. He also directed his son to make a further provision for her comfortable support over and above the annuity in these words:

"It is, however, my will and desire that my said wife may be comfortably provided for and that my said son shall do all that natural love and affection should dictate, or that she should reasonably require."

The annuity was declared to be not a charge on any of the lands except the house and grounds above mentioned. The widow and son are both dead. The son died in 1876, intestate, and without having exercised the power of sale, leaving three daughters and a widow. In 1883 the elder of these three daughters, having attained her majority, instituted proceedings in this court for a partition of the lands in question, making her sisters, who were still infants, and her mother, parties to her bill. Under those proceedings the land was sold, and the proceeds divided between the three children and widow, the latter accepting a sum in gross.

The first objection to the title is that this power of sale is still outstanding, and may yet be executed at the instance, and for the benefit, of the children who were infants when the decree for sale in partition was made.

I do not think this objection has any strength whatever. The gift of the power to the executor is, in this case, a mere addition to a devise in fee to the son. At one time it was successfully contended that such a power was idle and nugatory, and therefore void. *Goodill* v. *Brigham*, 1 Bos. & P. 192; *Maundrell* v. *Maundrell*, 7 Ves. 567, 583, where Sir WILLIAM GRANT held

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that a widow could not be barred of her dower by the exercise of such a power appurtenant to a fee. The power in such cases was held to be merged in the fee. 1 Sugd. Powers, 105 *et seq.* This decision of Sir WILLIAM GRANT was reserved on appeal by Lord ELDON, 10 Ves. 246, 256, on the ground that the erection of such a power of sale appurtenant to a fee was in common use by the great English conveyancers as a legitimate means of enabling the grantee to bar his wife's dower, and also of enabling a *feme covert* to convey by simpler and less expensive machinery than was required to pass a fee in the ordinary way.

In the case in hand the only beneficial use which could be made of the power was to enable the son to convey free of his own debts and of his wife's inchoate dower in order to provide for his mother, in accordance with the express direction and wish of the testator. No other person but his mother could derive any direct benefit from its exercise. It also enabled the son to convert realty into personalty, and transmit it in that shape to his children, free of dower on the part of his wife

From this view it follows that the power was one inherently of a nature not to be exercised by any one but the grantee, and therefore not transmissible or to be exercised by an administrator *de bonis non*, or other representative in succession.

The case does not fall within the terms of the statute authorizing sales by representatives in succession, but is clearly within the line of cases holding such representatives incapable of conveying. *Chambers* v. *Tulane*, 9 N. J. Eq. 146; *Naundorf* v. *Schumann*, 41 N. J. Eq. 14, 2 Atl. Rep. 609.

The language of the will in this case is as follows: "I authorize my executor to sell and convey at any time *he may deem proper and expedient.*" This language is too plain for argument.

It was left wholly discretionary with the son whether he would or would not cut off his wife's dower, or whether he would use the power to raise money for his mother.

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But, further, upon the facts as stated, and independent of the language importing special trust and confidence in the son, it seems to me the power ought to be decreed to have expired and to be lost by lapse of time and want of any object to keep it alive. It would be dangerous to give countenance to the idea that in a case like this an old power could be hunted up, revived, and put in force, in order to divest titles derived from the heirs of the devisee in fee-simple. *Moores* v. *Moores*, 41 N. J. Law, 440; and see *In re Cotton's Trusts*, L. R. 19 Ch. Div. 624, where many cases are collected.

I should have thought it unnecessary to cite cases on this point were it not for one case in our reports, viz., *Scudder* v. *Stout*, 10 N. J. Eq. 377, where Chancellor WILLIAMSON upheld a conveyance made by trustees seventeen years after the power had accrued, on the ground that although the trustees acted in bad faith, and their conduct was fraudulent, yet the purchasers from them acted in good faith, and without notice of the bad faith of their grantors; and he gave the complainant in that suit relief against the trustees who made the sale, and against the *cestuis que trustent* who received the proceeds of the sale. But it is plain that the learned chancellor was strongly influenced by the circumstance that the grantees had paid their money in good faith, and had been in possession under their title for 15 years before any suit was brought to disturb them, and that the sale was promoted by the father of the complainant.

But, further, here it seems to me that the two infant children are as much bound by the partition proceedings as if they had been adults. They were regularly brought into court, and guardians appointed for them. The title was adjudged to be in them, as tenants in common with their adult sister, and a proper share of the proceeds of the sale paid to the guardian of each, and they have each, since their majority, accepted from the guardian the sum so awarded. No court, under the circumstances, would appoint new trustees to execute the power of sale, and this court would not permit the

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two children, who were infants when the partition was made, to take any benefit from a sale of the same premises by a new representative of their grandfather, under this power. The complainant in the partition suit is equally estopped, for she conveyed to the devisee of the complainant. There are no other persons who can possibly derive any benefit from the exercise of the power.

The next objection taken to the title arises under the will of William W. Sites, the husband of complainant, who acquired title to the premises in question by conveyance from Mary W. Jewett, who purchased at the sale under the partition proceedings.

The clause in the will of said Sites, which is the basis of the objection, is as follows:

"I give and bequeath to my wife, Jeannie M. Eldredge, (the complainant,) all my real and personal estate, consisting of clothing, jewelry, money, and all the instruments, desks, office appurtenances; and other property of like nature now belonging to me, and purchased prior to May 1, 1884, now in the office of the firm of Sites & Harrison."

The defendant argues that the ordinary force of the word "real" in this clause is cut down and limited by the context, so as to make it include only the particular chattels enumerated; and, further, that those chattels are in their nature chattels real; and he relies upon the line of cases collected and cited by Mr. Jarman in his treatise on Wills, (Rand. & Talc. ed., vol. 2, p. 315, 716 *et seq.*) An examination of those cases will show that in most of them the contest was over the force of the word "estate," without any preface of "real" or "personal;" the question being whether, considering its "society," it was intended to include lands held in fee simple or not. In England a large portion of the lands have always been held under long leases, and chattels real were a frequent subject of testamentary disposition. I find the question arose there in one case whether the word "real" should not be confined to chattels real. The case is *Marhant* v. *Twisden*, Gilb.

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Eq. 30, decided in 1712, and cited by Mr. Jarman, (p. 717.) A testator, after bequeathing several pecuniary legacies, proceeded thus: "All the rest and residue of my estate and chattels, real and personal, I give and devise to my wife," etc.; and it was held that the word "real" must be confined to chattels real. Mr. Jarman says of that case that "no case has gone so far in restraining the word 'estate.' Nothing was more obvious than to consider the word 'real' as applying to 'estate,' and 'personal' to 'chattels,' corresponding, as they respectively do, in local order; and such it is confidently apprehended would be the construction at this day." That Mr. Jarman's criticism is correct, abundantly appears by a consideration of the later cases cited by that learned author.

But I do not think that *Marhant* v. *Twisden*, even if still an authority, can have any bearing on the case in hand, for I do not find any chattels real among those enumerated in Sites' will.

Another case liable, momentarily, to be supposed to resemble that in hand is *Timewell* v. *Perkins*, 2 Atk. 102, decided in 1740 by Mr. Justice FORTESCUE, sitting at the rolls. The question arose on the will of John Hitchins, in these words:

"All those my freehold lands and hop-grounds, with the messuages or tenements, barns, etc., now in the tenure and occupation of the widow Leach, and all other the rest and residue and remainder of my estate, consisting in ready money, plate, jewels, leases, judgments, mortgages, etc., or in any other thing whatsoever or wheresoever, I give unto my dearly beloved Arabella Hitchins and her assigns, forever."

And the question was whether the residue of the real estate passed to Arabella under this disposition, and it was held that it did not; the judge remarking: "The word 'estate' itself indeed may include as well real as personal: yet when the testator has expressed himself by such words as are applicable to personal only, I cannot intend he meant the real estate."

In addition to this reason, founded on the words fol-

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lowing, and qualifying the word "estate" in that case, there is the further consideration, not alluded to by the judge, that the testator preceded the gift of the residue by a specific devise of certain described lands to the same beneficiary, and no reason was apparent why he should pick out and devise specifically one particular parcel of freehold to the devisee, and then proceed, in the same sentence, to devise all the residue of the realty to the same person by general words. The maxim, *inclusio unius, exclusio alterius*, seems to me to apply; but I think it apparent from the numerous later decisions cited further on by Mr. Jarman that the English courts at this day would hold that the residue of the realty would have passed in that case under the very strong words found in the latter part of the devise.

It is enough for present purposes to say that the case does not reach the one in hand.

I have carefully examined all the cases cited, and find among them no authority for restricting the force of the word "real" in Sites' will. In fact, except as to certain set phrases so long in use by the English conveyancers as to have acquired a technical meaning, precedents are of little value in interpreting wills. The modern tendency is to confine the attention to the meaning of the words as found in the will. In reading this I have not the least doubt that by the words here used the testator meant to give his wife all his real estate. Such is the natural meaning of the language, "I give and devise to my wife, Jeannie M. Eldredge, all my real and personal estate;" and the words "consisting of," etc., which follow, are naturally confined to the words "personal estate," and were intended simply to specify what that personal estate consisted of. At a venture, I should suspect that the enumeration was made as information to his executor that he claimed to own such property in severalty, as distinguished from other property which belonged to the firm of which he appears to have been a member.

I will advise a decree for the complainant.

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COFFMAN *vs.* COFFMAN.

(85 Virginia, 459.)

RIGHTS OF HEIRS—WORDS OF EXCLUSION—NO DISPOSITION—DEVISE BY IMPLICATION.

A testator can disinherit his heirs and next of kin only by leaving his property to others. Mere words of exclusion in an instrument making no disposition of the estate will not suffice to disinherit.

APPEAL from a decree of the Circuit Court. The opinion states the case.

Wm. B. Compton, for appellant.

Grattan & Stephenson, for appellees.

LEWIS, P. A will is defined to be the *disposition* of one's property, to take effect after death, Bouv. Law Dic. Or, as was said by Judge RICHARDSON, in *Carr* v. *Effinger*, 78 Va. 197, 202; "A will is an instrument for the sole purpose of *disposing* of one's property." Therefore, to sustain the decree of the circuit court in this case, two things must be implied from the paper in question. First, that the decedent intended it as a disposition of his property, to take effect at his death; and, secondly, that he meant to leave, and did leave, the whole of his estate to those persons standing in the relation of his heirs and next of kin, other than the appellant, who is expressly excluded. On the other hand the appellant contends that the instrument makes no disposition of the estate at all, and consequently that the decedent died intestate.

The paper is certainly an anomalous one, and none exactly like it is to be found in any case that has heretofore come before this court. The application, however, of certain well-settled principles, to the case, leads, we think, to the conclusion that the position taken by the appellant is the correct one.

It is a maxim that a testator can disinherit his heirs and next of kin only by leaving his property to others.

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Mere words of exclusion will not suffice; the estate must be actually given to somebody else. "Though the intention to disinherit the heir be ever so apparent," said Lord MANSFIELD in *Denn* v. *Gaskin*, Cowp. 657, "he must, of course, inherit, unless the estate is given to somebody else. So, in his celebrated argument in *Ackroyd* v. *Smithson*, 1 Bro. C. C. 503; 1 Lead. Cas. Eq. 872, Mr. Scott (afterwards Lord ELDON), said that the proposition that the heir-at-law is entitled to every interest in land not disposed of by his ancestor is so much of a truism, that it calls for no reasoning to support it. It is not enough, he said, that the testator did not intend his heir to take; he must make a disposition in favor of another, otherwise the heir will take even against his intention, however plainly manifested. And the reason is that the law provides how a man's estate at his death shall go, unless he by his will plainly directs that it shall be disposed of differently." It is true the devise or bequest need not be in express terms, and that it may be by necessary implication; but to justify such an implication the intention of the testator must be so apparent that an intention to the contrary cannot be supposed, for otherwise the implication is not a necessary one. 1 Jarm. Wills, 532. Thus a devise to the testator's heir after the death of A. gives to A. a life-estate by implication, because otherwise the devise to the heir, upon whom the law casts the property in the absence of a disposition of it by the testator, would be rendered nugatory, and it would, therefore, be absurd to suppose that the testator meant to devise the land to his heirs at the death of A., and yet that the heir should have it in the meantime. But no such implication arises where the devise is to *a stranger* after the death of A.; for in such a case it is possible to suppose that the testator meant the heir to take the land during the life of A., and therefore an intention to give a life-estate to A. cannot be supposed. And this, says Jarman, is an exact illustration of the difference between necessary implication and conjecture.

According to Lord MANSFIELD, "necessary implica-

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tion" is that which clearly satisfies the court what the testator meant by the words used. It is the opposite, he said, of "conjecture," and leaves no room to doubt. *Wilkinson* v. *Adam*, 1 Ves. & B. 466; *Jones* v. *Morgan*, cited in 4 Bro. C. c. 460; Hawk. Wills, 5.

Redfield lays it down that, in order to create a devise or legacy by implication, it must not be a case of mere slight probability, but something in regard to which most men would not be expected to raise any question. It must not rest upon conjecture. Neither is it required that the inference should be absolutely irresistible. It is enough if all the circumstances taken together leave no doubt in the mind of the court. The words of the will, he adds, must admit of no other implication. 2 Redf. Wills, 203.

In Cruise, Dig. tit. "Devise," c. 10, § 19, it is said: "The courts have in some instances allowed a devise by implication, where it has been very apparent, in order to support and effectuate the intention of the testator; but in cases of this kind the implication must be a plain, and not merely a possible or probable, one; *for, the title of the heir at law being plain and obvious, no words in a will ought to be construed in such a manner as to defeat it, if they can have any other signification.*" See, also, 3 Lomax, Dig. 148; Bac. Abr. tit. "Wills," G.; 2 Minor, Inst. 969; Schouler, Wills, § 479; *Wright* v. *Hicks*, 12 Ga. 155; s. c. 56 Am. Dec. 451; *Wilkinson* v. *Allen*, 18 How. 385; *Bradford* v. *Bradford*, 6 Whart. 244; *Fitch* v. *Weber*, 6 Hare, 145.

The doctrine of devises by implication was very fully considered in *Boisseaus* v. *Aldridges*, 5 Leigh, 222. In that case the decedent left a written instrument as follows:

"Not having made any will so as to dispose of my property, and two of my sisters marrying contrary to my wish, should I not make one, I wish this instrument to prevent either of their husbands from having one cent of my estate,—say the husbands of my two sisters Martha Aldridge and Dorothy Aldridge,—nor either of them to have one cent, unless they should survive their

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husbands; in that case I leave them to be paid out of the collection of any of my moneys 500 dollars each. Given under my hand and seal," etc. And on the paper was endorsed the following:

"*Memorandum.* To prevent Bennett Aldridge and Burwell Aldridge from having any part of my estate that each might claim in right of their wives, without a will made by me."

It was argued by Messrs. Johnson and Leigh that, excepting the two contingent legacies, this writing was a devise and bequest, by implication, of the whole of the testator's estate to those persons who would take according to the statutes of descents and distributions, other than the two sisters and their descendants. The latter, they insisted, could have been excluded for no other purpose than to give the estate to others, and that, if the testator did not mean that, he meant nothing.

But this view, though pressed upon the court with great earnestness and ability, was not adopted, and the decree of the lower court was affirmed, which declared that the right of a person to disinherit his heirs, or any one of them, exists, not as an abstract substantive power, but as the consequence of the power to leave his estate to others; that the paper in question was not a devise or bequest by necessary implication; and that it was evidently executed under the erroneous impression that, if its author declared his intention to exclude his two sisters, the law would dispose of his estate among his heirs and next of kin, to the exclusion of the sisters mentioned therein.

It is true that two of the judges who delivered opinions in that case were of opinion that the instrument itself furnished internal evidence that it was not intended by the decedent to operate as a will any further than the contingent legacies therein bequeathed; but the principle that a man can disinherit his heirs only by unmistakably giving his estate to somebody else was none the less emphatically asserted. To hold otherwise, it was said, would give to a testator the

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power to repeal the statute of descents and distributions, so far, at least, as it affects his own estate.

It was also held that if in every case in which a testator declares an intention to exclude his heirs, or any one of them, it is to be implied from that alone that he intends to devise away his estate from such excluded person or persons, the principle that to disinherit his heirs he must give his estate to some body else would be of no consequence, since it would give effect to the simple disinherison by holding it tantamount to a positive disposition.

Another analogous principle affirmed in that case, and which is very material to the present, is this: That while the intention of the testator, when consistent with the rules of law, is the polar star to guide the judicial expositor of a will, yet his intention to dispose of his estate must be indicated with legal certainty; otherwise effect as a will cannot be given to the instrument,—the true inquiry being, not what the testator meant, but what the words used import.

Judge BROOKE, in his opinion, said: "When a testtor has devised his estate by will, and is not precise as to the persons who are to take, or as to the quantity of estate they are to take, from necessity, and to effectuate his intention to dispose of his estate, and not to leave it to the law to dispose of, courts simply imply his intent as to persons, and the quantity of the estate they are to take. But when the question is whether he intended *to devise his estate or not*, we are not unauthorized to imply that he does, unless it is a necessary inference from the language he uses."

He then referred to the case of *Denn* v. *Gaskin*, in which the testator gave his heir-at-law a disinheriting legacy, as it is called (*i. e.*, he gave him ten shillings), and then gave his nephews real estate without adding words of inheritance. He began his will thus: "As to all such worldly estate as God has endued me with," etc.; and the question was whether by necessary implication from these words, and the intended exclusion of the heir, the life-estate given the nephews was enlarged

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into a fee. Lord MANSFIELD held that it was not, although he said he suspected extremely that the testator meant to give the devisees an estate in fee, as he had no other landed property, and had made them residuary legatees of his personalty, and had disinherited the heir; but that, if he did mean it, the misfortune was that *quod voluit non dixit.* And he added the remark already quoted from his opinion, namely, that, though the intention is ever so apparent, the heir-at-law must of course inherit, unless the estate is given to somebody else. Accordingly it was held that the fee, being undisposed of, descended to the heir, notwithstanding the intention of the testator to disinherit him; just as in *Boisseaus* v. *Aldriges* the two excluded sisters were held entitled, not only to their contingent legacies, but to share in the residue of the estate as to which the testator died intestate, because, as was said, the statute gives the power to *devise*, and not in any other way to disinherit.

In *Wootton* v. *Redd's Ex'rs*, 12 Grat. 196, Judge LEE, speaking for the court, announced the same doctrine. He said: "Conjecture cannot be permitted to usurp the place of judicial conclusion, nor to supply what the testator has failed to sufficiently indicate. The law has provided a definite successor to the estate in the absence of a testamentary disposition, and the heir is not to be disinherited, unless by express words or necessary implication." "The courts must therefore declare, if they can," he continued, "what intention the testator has expressed with sufficient legal certainty; not the intention which he may have entertained, but which he has failed sufficiently to manifest;" citing *Guy* v. *Sharp*, 1 M. & K. 589, 602; *Martin* v. *Drinkwater*, 2 Beav. 215. See, also, *Hatcher* v. *Hatcher*, 80 Va. 169; *Senger* v. *Senger's Ex'r*, 81 Va. 687; *Sutherland's Ex'rs* v. *Sydnor*, 84 Va. 880; 6 S. E. Rep. 480.

Let us now apply these principles to the present case. The paper in question is as follows:

"I, Hiram Coffman, of Rockingham county and State

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of Virginia, do make and ordain this to be my last will and testament; hereby revoking all other wills heretofore by me made. It is my will that my son William H. Coffman be excluded from all of my estate at my death, and have no heirship in the same, he having become the heir to his mother's interest in her father's estate; and I, his guardian, have paid him, and am now about to make a final settlement with him, which will make as much to him, and probably more, than my estate will pay to each of my other legal heirs. In witness of this being my last will and statement, I hereunto set my hand, and annex my seal, this, the 10th day of March, 1877.

"HIRAM COFFMAN." [Seal.]

Now, this paper is certainly in the form of a will, and was declared by the decedent to be his will, and his intention to exclude his son William, the appellant here, is as plainly manifested as it well could be. But is it in substance a will? Does it dispose of anything? The circuit court held that by implication it does. But is such a conclusion a necessary implication from the words used? Can the words be said to have no other signification? Taken together, do they clearly satisfy the mind, leaving no room to doubt that the decedent meant to *dispose* of his estate? We think not. On the contrary, fairly construed, the instrument simply revokes all other wills theretofore made by the decedent, and excludes the appellant, *giving the reason therefor.* That is all, and to hold that it amounts to anything more would render futile the principle that a man can disinherit his heirs only by giving his estate to somebody else, and by carrying too far the doctrine of devises by implication would by judicial construction make a will for the decedent that he has not made for himself.

The record presents the case of a man who has a valuable estate, and a wife and five children, a son by his first marriage, another son by his second marriage, and three children by his third and last marriage. All

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his children are equally as near, and all presumably are equally as dear, to him. The eldest son has already inherited property equal in value, we will say, to one-fourth of his father's estate. Accordingly the father, wishing to do what he considers justice to all of his children, writes a paper which he calls a "will," and in that paper he says, in substance, that he wishes to disinherit his eldest son; and then, lest his motive be imputed to a want of parental affection (we will assume), he goes on and gives the reason for wishing to exclude him, and there he stops. He does not say his "other legal heirs" are to have the estate, but that his eldest son is *not to have* any part of it. And from this we are asked to imply that he intended to give, and consequently, as a legal conclusion, to hold, that he did give, the whole of his estate to his other children; in other words, to hold that the reason assigned for wishing to exclude one of the children operates a disposition of the estate to the other children.

But this view is contrary to the plainest principles of the law, as we have already seen; for the question is not what the decedent intended, but what he has said; not what he may have thought would be the result of what he wrote, but what is the legal effect of the paper. And, although he may have intended to dispose of his estate, yet, if he has not said so with legal certainty, we cannot alter or add to his words, but our judgment must be, as Lord MANSFIELD'S was in *Denn* v. *Gaskin*, *quod voluit non dixit*; for we sit here, not to make wills, but to construe them; not to make law, but to administer it.

It is quite probable the paper was written by the decedent under the erroneous impression that, if he would declare his intention to exclude the appellant, in the form of a will, the statute of descents and distributions would step in and do the rest, *i. e.*, that it would in effect make a better will for him than he could make for himself, by giving his estate to his other heirs and next of kin, and hence *he* made no disposition of it. His language, we think, shows this. Had he stopped

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at the point where he declared the appellant is to have no heirship in the estate, there could be no controversy, notwithstanding the paper in the introductory part is called a "will." This is conceded, and yet what follows merely shows why he wished to exclude him, which is a very different thing from actually excluding him by disposing of his estate, no matter what his intention was; for in such a case an intention not expressed or clearly manifested is equivalent in law to an absence of a testamentary intent altogether.

And herein lies the error of the decree complained of, namely, in giving effect to the intention of the decedent to exclude the appellant by making it tantamount to a disposition of the estate to the other children, which can no more be rightly done than the starting of a person on a journey can be said to be, in legal contemplation, the arrival of such person at the point of destination; and so here the decedent, intending to exclude the appellant, started out well enough in that direction, but unfortunately for the appellees he stopped before he reached the legal consummation of his purpose.

That, in order to effect that purpose, he would have gone further, and given his estate in unmistakable terms to his other children, if the necessity for so doing had occurred to him, is also probable; for it is impossible to read the paper in question without perceiving that the thought uppermost in his mind was to exclude the appellant. But the idea that under any circumstances he would have done so rests upon conjecture merely, which is not necessary implication, but the opposite, and can never alone support a devise or bequest. In *Jones* v. *Morgan*, Lord MANSFIELD said that "'conjecture' is when you suppose what would have been the testator's meaning if he had had the whole case before him, and what, if he had thought of such an event, he would have said upon it;" "and," he added, "you are not to conjecture what he would have done in an event he never thought of; that will not do." Fearne, Rem., app. 576.

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Every man, it is true, is presumed to know the law; but to say that the decedent must be presumed to have known that the mere exclusion of the appellant would not operate to give the estate to anybody else, and *therefore* that he meant to give, and consequently did give, the estate to his remaining children, is substantially to assert a proposition which has been emphatically repudiated by this court, and by all courts where our system of jurisprudence prevails.

Moreover, no executor is appointed by the paper in question, nor is there any mention of the debts of the decedent, or of the widow's dower or interest in the estate, or any direction as to how the estate shall be divided or disposed of; and, while it is true the law provides for the payment of debts, the assignment of dower, etc., yet the omission to make mention of any of these matters is a circumstance in the case not without significance, as tending to support the view already expressed. Persons often die intestate, but it is certainly not usual, nor can it hardly be said to be natural, for a man having a valuable real and personal estate to leave a will disposing of it, and make no specific devises or bequests, or give any direction touching the estate whatever. And here there is no direction as to anything, but simply a revocation of previous wills, and an intended disinherison of the appellant; because, in the language of the decedent, the appellant's inheritance from another source "will make as much to him, and probably more, than my estate will pay to each of my other *legal heirs*,"—words which of themselves import intestacy, being emphatically words of inheritance. And as to the word "pay," upon which so much stress is laid by counsel for the appellees, that is quite as applicable to the distribution of an estate of an intestate as to any other.

Again, suppose the appellant had died before the decedent, leaving descendants. What is there in this paper to prevent those descendants, as heirs-at-law of the decedent, from sharing in the estate? There is certainly nothing that would expressly exclude them,

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and this circumstance also strengthens the view that the paper was written, not to dispose of anything, but simply to revoke previous wills, and to exclude the appellant, without going, or intending to go, further than to give the reasons.

Our conclusion therefore is that the paper is not the will of the decedent; that, if he meant to dispose of his property, he has not said so with legal certainty; and consequently that at his death his estate passed to his heirs and next of kin, including the appellant. It is certainly safer and more consonant with public policy to closely adhere to settled principles, than in doubtful cases to interrupt the course of descent and distribution of estates which the statute prescribes in cases of intestacy; for the statute, which has been said to be a transcript of the human affections, is a wise and just one, and ought to govern in all cases not plainly without it. In *Boisseaus* v. *Aldridges* it was said by Judge BROOKE, and reaffirmed by the courts without dissent in the recent case of *Sutherland's Ex'rs* v. *Sydnor*, 84 Va. 880, 6 S. E. Rep. 480, that property is the creature of the law, and can be disposed of at all only because the law permits it to be done in certain modes. And hence the result in the present case imposes no hardship on any one, as it puts all the children of the decedent on the same footing with respect to his estate, simply because their father has not availed himself of the permission that the law gave him to dispose of it differently.

The decree must therefore be reversed, and a decree entered here in conformity with this opinion.

RICHARDSON, J., dissented.

Decree reversed.

Disposition of Property—Intestacy—What is a Will.—In the case of Den v. Gaskin, Cowp. 657, the introductory words of the will were: "As to all such worldly estate as God has endued me with, I give and bequeath as follows:" and Lord Mansfield therein held that the heir at law must inherit although the intention be ever so apparent to disinherit him, unless the estate and all thereof be given to some one else.

In Wright v. Russell, Cowp. 661, the words of introduction to the will were: "As touching the disposition of all such worldly estate

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as it hath pleased God to bestow upon me I give," etc. Then the testator gave a house to his grandson and after his decease to his two sons, and then devised to the husband of his heir-at-law one shilling. The litigated question was whether the great grandsons took an estate for life or in fee, and the court, by ASTON, J., held that they took only an estate for life.

In Boisseaus v. Aldridges, 6 Leigh, 22, 2237, the facts of which are fully set out in the principal case, BROOKE, J., said:—

"It is somewhat remarkable that this case has no exact example in any of the English cases which have been cited or to which I have been able to refer. It must be decided, therefore, on principle and not on authority. I think it a principle not to be controverted that one cannot disinherit his own heir unless he devises his estate to somebody else. This principle is fully recognized by Lord MANSFIELD in the case of Den v. Gaskin. To give to a testator the power to disinherit his heirs, whom the law has appointed to take the estate unless he devises it to some other person, would be in effect to give him authority to repeal the statutes of descents and distributions. That a testator may disinherit his heirs by giving his estate to somebody else cannot be doubted. But if in every case in which he intends to exclude his heirs from the inheritance it is to be implied from that alone that he devises his estate to those who (some of his heirs being excluded) would take the inheritance, the principle that, to disinherit his heirs, he must devise his estate to somebody else, would be of no consequence because every exclusion of his heirs would be a devise to somebody else. This principle, that a testator cannot disinherit his heirs unless he devises his estate to somebody else, results from the nature of the property. It is the creature of the law, and the law will dispose of it unless, under the permission which the law gives the owner to make a will, he disposes of it."

The principle established by the famous case of Ackroyd v. Smithson, 1 Bro. C. C. 503, has been relied upon and followed in many subsequent cases, Robinson v. Taylor, 2 Bro. C. C. 589; Hutcheson v. Hammond, 3 Bro. C. C. 128; Chitty v. Parker, 4 Bro. C. C. 411; S. C., 2 Ves. Jr. 683; Connell v. Abbott, 4 Ves. 802; Berry v. Usher, 11 Ves. 205; Wilson v. Major, 11 Ves. 205; Gibbs v. Oughier, 12 Ves. 418; Wright v. Wright, 16 Ves. 188; Hill v. Cocks, 1 Ves. & Bea. 173; Gibbs v. Rumsey, 2 Ves. & Bea. 294; Kellett v. Kellett, 2 Ba. & Be. 533; Hooper v. Goodwin, 18 Ves. 156; Ashby v. Palmer, 1 Meriv. 296.

In Sutherland v. Sydnor, 84 Va. 880, cited in the principal case, the court construed the following provision of a will: "I leave my two daughters, Ida and Mollie, my homestead tract, containing 275 acres of land, more or less, during life. In case of Ida's death without an heir, I wish her portion to revert back to Mollie or her living heirs or heir." Mollie died first, leaving a son, then Ida died without issue, and the court held that Mollie took a life estate and that the later expression in the will "having disposed of what I have" and the speaking of a devise to his son as "his portion of my estate" did not alter the case. This case cites with approval Boisseaus v. Aldridges, 5 Leigh, 222.

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GIBBONS *vs.* MAHON.

(136 United States, 549.)

TRUST—INCREASE OF CAPITAL STOCK—RIGHTS OF LIFE TENANT AND REMAINDERMAN.

Where certain shares of capital stock in a business corporation were bequeathed in trust to pay over the "dividends of said stock" to another during her life, remainder to the trustee absolutely, and thereafter the corporation increased its capital stock to represent profits actually invested in extending and perfecting its plant, and distributed the new shares *pro rata* among the holders of the old, the new shares represented capital, and not income or "dividends," and therefore the trustee was entitled, as against the life-tenant, to hold the new shares received by her, subject to the same trust as the old, and with the same right of remainder.

THIS was a bill in equity by Mary Ann Gibbons against Jane Owen Mahon, to compel the transfer to the plaintiff of shares in the Washington Gas-Light Company, held by the defendant as trustee under the will of Ann W. Smith. The case was heard upon bill and answer, by which, and by the Acts of Congress concerning that company, the facts appeared to be as follows;

Mrs. Smith, a widow, and the mother of both parties to this suit, died March 26, 1865, owning 280 shares in that company, and leaving a last will, dated February 11, 1865, and admitted to probate April 8, 1865, containing the following bequest:

"I hereby give, devise and bequeath to my daughter, Jane Owen Mahon, wife of David W. Mahon, of the City of Washington aforesaid, and to her heirs and assigns, two hundred and eighty shares of stock of the Washington Gas-Light Company, also forty-five shares of stock of the Franklin Insurance Company, both in the City of Washington aforesaid; also eight thousand five hundred dollars in government bonds of the government of the United States of America; said stock and bonds, or any portion of them remaining at my death, a part of my said estate; to have and to hold the same in and upon the trusts and provisions following:

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That is to say, in trust for the advantage and behoof of my said daughter, Mary Ann Gibbons; and that after my decease the said Jane Owen Mahon, her heirs and assigns, shall cause the dividends of said stock and the interest of said bonds as they accrue to be paid to my said daughter, Mary Ann Gibbons, during her lifetime, without percentage of commission or diminution of principle; and in case of the death of the said Mary Ann Gibbons, then the said stocks, bonds and income shall revert to the estate of my said daughter, Jane Owen Mahon, without incumbrance or impeachment of waste."

The Washington Gas-Light Company was incorporated by Act Cong. July 8, 1848, c. 96, with a capital of $50,000, divided into shares of $20 each; 9 St. 722. It was authorized to increase its capital stock to $350,000 by Act Aug. 2, 1852, c. 79, and to $500,000 by Act Jan. 3, 1855, c. 22; 10 St. 734, 835. At the death of the testatrix the capital stock amounted to $500,000, consisting of 25,000 shares of $20 each. By Act May 24, 1866, c 97, the capital stock was increased to $1,000,000; 14 St. 53.

The company from time to time declared and paid dividends in money upon its stock, and such dividends were paid by the defendant to the plaintiff.

Before and after the death of Mrs. Smith, and before and after the passage of the Act of 1866, and before November 1, 1868, the company from time to time invested portions of its net earnings, income and profits in the enlargement and extension of its permanent works and plant employed in its legitimate business under its charter; and the actual cost of its works and plant, as shown by its construction account, amounted on January 1, 1865, to $842,623.02; on January 1, 1866, to $892,224.08; on January 1, 1867, to $935,039.55; on January 1, 1868, to $963,803.37; on July 1, 1868, to $988,914.84; and on January 1, 1869, to $1,039,287.17; and amounted, in fact, at the time of the passage of the Act of 1866, to not less than $900,000, and on October 1, 1868, to more than $1,000,000.

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On November 1, 1868, the board of directors of the company adopted the following resolution: "Whereas the construction account of this company exceeds one million of dollars, and as the capital of this company has been increased by an Act of Congress to one million of dollars, therefore be it resolved, that the increased stock be awarded among the stockholders, share for share, as they stood on the 1st of October, 1868."

On September 29, 1868, the defendant surrendered to the company the certificate for the 280 shares mentioned in Mrs. Smith's will, and those shares were transferred on the books of the company to the name of the defendant, as trustee; and on November 17, 1868, the company made out and delivered to the defendant, as trustee, a certificate for the 560 shares.

The defendant paid to the plaintiff from time to time the dividends afterwards declared on the 560 shares, but never transferred to her the 280 new shares.

The court dismissed the bill, and delivered an opinion reported in 4 Mackey, 130; and the plaintiff appealed to this court.

H. E. Davis, for appellant.

J. Hubley Ashton, for appellee.

Mr. Justice GRAY, after stating the case as above, delivered the opinion of the court.

The question presented by the claims made in the bill and answer and by the arguments of counsel is whether the 280 new shares of stock in the Washington Gas-Light Company are to be treated as dividends, to the whole or part of the principal of which the plaintiff is entitled under the will, or are to be treated as an increase of the capital of the trust fund, and the plaintiff therefore entitled to receive only the income thereof.

The court below held that the new shares must be treated as capital, the income only of which was payable to the plaintiff. She contends that the new shares

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are in the nature of a dividend, to the whole of which she is entitled, or, if that position should not be maintained, that so much of the new shares as represent earnings made by the corporation since the death of the testatrix should be held to be income payable to her. Upon full consideration of the case, on reason and authority, this court is of opinion that the decision below is correct.

The distinction between the title of a corporation, and the interest of its members or stockholders in the property of the corporation is familiar and well settled. The ownership of that property is in the corporation, and not in the holders of shares of its stock. The interest of each stockholder consists in the right to a proportionate part of the profits whenever dividends are declared by the corporation, during its existence under its charter, and to a like proportion of the property remaining, upon the termination or dissolution of the corporation, after payment of its debts. *Van Allen* v. *Assessors*, 70 U. S., 3 Wall. 573, 584; *Delaware Railroad Tax*, 85 U. S., 18 Wall, 206, 230; *Tennessee* v. *Whitworth*, 117 U. S., 129, 536, 6 Sup. Ct. Rep. 645; *New Orleans* v. *Houston*, 119 U. S., 265, 277, 7 Sup. Ct. Rep. 198.

Money earned by a corporation remains the property of the corporation, and does not become the property of the stockholders, unless and until it is distributed among them by the corporation. The corporation may treat and deal with it either as profits of its business or as an addition to its capital. Acting in good faith, and for the best interests of all concerned, the corporation may distribute its earnings at once to the stockholders as income, or it may reserve part of the earnings of a prosperous year to make up for a possible lack of profits in future years, or it may retain portions of its earnings and allow them to accumulate, and then invest them in its own works and plant, so as to secure and increase the permanent value of its property.

Which of these courses shall be pursued is to be de-

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termined by the directors, with due regard to the condition of the company's property and affairs as a whole; and, unless in case of fraud or bad faith on their part their discretion in this respect cannot be controlled by the courts, even at the suit of owners of preferred stock, entitled by express agreement, with the corporation to dividends at a certain yearly rate, "in preference to the payment of any dividend on the common stock, but dependent on the profits of each particular year as declared by the board of directors." *N. Y. L. E. & W. R. Co* v. *Nickals*, 119 U. S. 296, 304, 307, 7 Sup. Ct. Rep. 209.

Reserved and accumulated earnings, so long as they are held and invested by the corporation, being part of its corporate property, it follows that the interest therein, represented by each share, is capital, and not income, of that share, as between the tenant for life and the remainderman, legal or equitable, thereof.

Whether the gains and profits of a corporation should be so invested and apportioned as to increase the value of each share of stock for the benefit of all persons interested in it, either for a term of life or of years, or by way of remainder in fee, or should be distributed and paid out as income, to the tenant for life or for years, excluding the remainderman from any participation therein, is a question to be determined by the action of the corporation itself, at such times and in such manner as the fair and honest administration of its whole property and business may require or permit, and by a rule applicable to all holders of like shares of its stock, and cannot, without producing great embarrassment and inconvenience, be left open to be tried and determined by the courts as often as it may be litigated between persons claiming successive interests under a trust created by the will of a single shareholder, and by a distinct and separate investigation, through a master in chancery or otherwise, of the affairs and accounts of the corporation, as of the dates when the provisions of the will of that shareholder take effect, and with regard to his shares only.

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In ascertaining the rights of such persons, the intention of the testator, so far as manifested by him, must of course control; but when he has given no special direction upon the question as to what shall be considered principal and what income, he must be presumed to have had in view the lawful power of the corporation over the use and apportionment of its earnings, and to have intended that the determination of that question should depend upon the regular action of the corporation with regard to all its shares.

Therefore, when a distribution of earnings is made by a corporation among its stockholders, the question whether such distribution is an apportionment of additional stock representing capital, or a division of profits and income, depends upon the substance and intent of the action of the corporation, as manifested by its vote or resolution; and ordinarily a dividend declared in stock is to be deemed capital, and a dividend in money is to be deemed income, of each share.

A stock dividend really takes nothing from the property of the corporation, and adds nothing to the interests of the shareholders. Its property is not diminished, and their interests are not increased. After such a dividend, as before, the corporation has the title in all the corporate property; the aggregate interests therein of all the shareholders are represented by the whole number of shares; and the proportional interest of each shareholder remains the same. The only change is in the evidence which represents that interest, the new shares and the original shares together representing the same proportional interest that the original shares represented before the issue of new ones.

In *Bailey* v. *N. Y. Cent. & H. R. R. Co.*, 89 U. S., 22 Wall. 604, cited for the plaintiff, the point decided was that certificates, issued by a railroad corporation to its stockholders, as representing earnings which had been used in the construction and equipment of its road, and payable, at the option of the company, with dividends like those paid on the stock, were within that provision of the Internal Revenue Laws, which enacted that any

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railroad company "that may have declared any dividend in scrip or money due or payable to its stockholders," "as part of the earnings, profits, income, or gains of such company, and all the profits of such company, carried to the account of any fund, or used for construction, shall be subject to and pay a tax of five percentum on the amount of all such" "dividends or profits, whenever and wherever the same shall be payable, and to whatsoever party or person the same may be payable." Acts June 30, 1864, c. 173, § 122, (13 St. 284); July 13, 1866, c. 184 § 9, (14 St. 138, 139). The question at issue was not between the owners of successive interests in particular shares, but between the corporation and the government, and depended upon the terms of a statute carefully framed to prevent corporations from evading payment of the tax upon their earnings. The opinion delivered by Mr. Justice CLIFFORD, though containing some general expressions which, taken by themselves, might seem to ignore the settled distinction (affirmed by this court in earlier and later cases above cited) between the property of the corporation and the interests of the shareholders, yet explicitly recognized that "net earnings of such a company may be expended in constructing or equipping the railroad, or in the purchase of real estate or other properties," and "may be distributed in dividends of stock or of scrip or of money;" that "purchasers of stock have a right to claim and receive all dividends subsequently declared, no matter when the fund appropriated for the purpose was earned;" that "as a general rule, stock dividends, even when they represent net earnings, become at once a part of the capital of the company;" and that "such a dividend, if earned and declared, necessarily increases the value of the old stock, if new stock is not issued, and in that mode reaches substantially the same result." 89 U. S., 22 Wall. 635-637.

In Great Britain it is well settled that where a corporation, whether authorized or unauthorized by law to increase its capital stock, accumulates and invests

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part of its earnings, and afterwards apportions them among its shareholders as capital, the amount so apportioned must be deemed an accretion to the capital of each share, the income of which only is payable to a tenant for life.

From the beginning of this century it has been established, by decisions of the Court of Chancery in England, and of the House of Lords on appeal from Scotland, that where a bank, having no power by law to increase its capital stock, has used its accumulated profits as floating capital, and invested them in securities which can be turned into cash at pleasure, an extraordinary dividend or bonus declared out of such profits is capital, and not income, of each share, as between owners of the life-interest and of the interest in remainder therein, without inquiring into the time when the profits were actually earned. *Brander* v. *Brander*, 4 Ves. 800; *Irving* v. *Houstoun*, 4 Paton, 521, *Cuming* v. *Boswell*, 2 Jur. (N. S.) 1005, 1008, 28 Law T. 344, and 1 Patterson, 652.

In *Irving* v. *Houstoun*, Lord ELDON (Lord ROSSLYN and Lord ALVANLEY concurring) said that if an owner of bank stock "gives the life-interest of his estate to any one, it can scarcely be his meaning that the life-renter should run away with a bonus that may have been accumulating on the floating capital for half a century;" and that to take an account of the precise amount of profits which had accumulated before and after the commencement of the life-interest in particular shares would lead to inconveniences which would be intolerable. 4 Paton, 530, 531. In *Cuming* v. *Boswell*, above cited, and relied on by the present plaintiff, the person held entitled to bonuses declared on bank stock was, as stated in the judgment delivered by Lord CRANWORTH, "not a life-renter, but an absolute fiar;" in other words, not a mere tenant for life, but an owner in fee, although his estate was determinable by his death without issue.

It is unnecessary, for the purpose of this case, to consider how far the English decisions upon the ques-

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tion whether a dividend in money, not declared to be made out of accumulated earnings, should be considered as capital or as income, can be reconciled with each other, or with sound principle. But there are two recent cases of great authority, concerning stock dividends, which directly bear upon the question before us.

In one of those cases, shares in a steam navigation company were settled by their owner upon trust to pay "the interest, dividends, shares of profits, or annual proceeds" to a woman, during her life, and after her death in trust for her children. The directors, acting within the scope of their authority, retained part of a half-year's profits, and applied it to pay for new boats, and the company passed a resolution to issue to existing shareholders new shares representing the money so applied. It was argued that "the company had no power to compel the tenant for life to risk any more in the venture than the shares originally held, and could not be allowed for themselves, by declaring or withholding a dividend out of the profits, to alter the rights as between tenant for life and remainderman." But Vice-Chancellor WOOD (afterwards Lord Chancellor HATHERLEY) held otherwise, and said: "As long as the company have the profit of the half year in their hands, it is for them to say what they will do with it, subject, of course, to the rules and regulations of the company. * * * The dividend to which a tenant for life is entitled is the dividend which the company chooses to declare. And when the company meet and say that they will not declare a dividend, but will carry over some portion of the half-year's earnings to the capital account, and turn it into capital, it is competent for them, I apprehend, to do so; and when this is done, everybody is bound by it, and the tenant for life of those shares cannot complain. The only mode in which a tenant for life could act would be to use his influence with his trustees as to their votes with reference to the proposed arrangement. * * * If a man has his shares placed in settlement, he gives his trustees, in whose names they stand, a power of voting, and he

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must use his influence to get them to vote as he wishes. But where the company, by a majority of their votes, have said that they will not divide this money, but turn it all into capital, capital it must be from that time. I think that is the true principle, and I must hold that these additional shares formed part of the capital fund under the settlement, and went to the children, and not to the tenant for life (their mother)." *Barton's Trust*, L. R. 5 Eq. 238, 243-245.

In the most recent English case on the subject William Bouch bequeathed to his executor, in trust for his widow for life, and after her death to the executor, his personal estate, including shares in an iron company, whose directors had power, before recommending a dividend, to set apart out of the profits such sums as they thought proper as a reserved fund, for meeting contingencies, equalizing dividends, or repairing or maintaining the works. Four years after the testator's death, the company, upon the recommendation of the directors, and out of a fund so reserved in the testator's lifetime, and of undivided profits, about half of which accrued before his death, made a bonus dividend, and an allotment of new shares, with liberty to each shareholder to apply the bonus dividend in payment for the new shares. Bouch's executor took the new shares, and applied the bonus dividend in payment therefor. The House of Lords, reversing the judgment of the Court of Appeals, and restoring an order of Mr. Justice KAY, held that the corporation did not pay or intend to pay any sum as a dividend, but intended to and did appropriate the undivided profits as an increase of the capital stock; that the bonus dividend was therefore capital of the testator's estate, and the widow was not entitled either to the bonus or to the new shares. The difference of opinion was not as to the general principle which should govern, but only as to its application to the action of the corporation in the particular case. The House of Lords fully approved the statements of the general principle by Vice-Chancellor WOOD, in *Barton's Trust*, above cited, and by Lord Justice FRY, in

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delivering the judgment of the Court of Appeals, as follows: "When a testator or settlor directs or permits the subject of his disposition to remain as shares of stock in a company, which has the power either of distributing its profits as dividend or of converting them into capital, and the company validly exercises this power, such exercise of its power is binding on all persons interested under him, the testator or settlor, in the shares; and consequently what is paid by the company as dividend goes to the tenant for life, and what is paid by the company to the shareholder as capital, or appropriated as an increase of the capital stock in the concern inures to the benefit of all who are interested in the capital. In a word, what the company says is income shall be income, and what it says is capital shall be capital." "In most if not in all cases, the inquiry as to the time when the profits were earned by the company is an immaterial one as between the tenant for life and remainderman. Their rights have been made dependent upon the legitimate action of the company, and (subject to any rights arising from the law of apportionment, which was not in question) are determined by the time, not at which the profits are earned by the company, but at [by] the time at which they are by the action of the company made divisible amongst its members." *Sproule* v. *Bouch*, 29 Ch. Div. 635, 653, 658, 659; *Bouch* v. *Sproule*, 12 App. Cas. 385, 397, 402, 407,408.

The same principle was established in Massachusetts before the case of *Sproule* v. *Bouch* had come before the courts of England. *Atkins* v. *Albree*, 12 Allen, 359; *Minot* v. *Paine*, 99 Mass. 101; *Deland* v. *Williams*, 101 Mass. 571; *Leland* v. *Hayden*, 102 Mass. 542; *Rand* v. *Hubbell*, 115 Mass. 461; *Gifford* v. *Thompson*, Id. 478. And in Connecticut, Rhode Island, and Maine a dividend of new shares, representing accumulated earnings, is held to be capital, and not income. *Brinley* v. *Grou*, 50 Conn. 66; *Brown's Petition*, 14 R. I. 371; *Richardson* v. *Richardson*, 75 Me. 570, 574.

In New York, the recent judgments of the Court of

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Appeals appears to have practically overruled the decisions of the lower courts in *Clarkson* v. *Clarkson*, 18 Barb. 646; *Simpson* v. *Moore*, 30 Barb. 637; *Woodruff's Estate*, Tuck. 58; and *In re Pollock*, 3 Redf. 100, cited in behalf of the plaintiff; and to have settled the law of that state in accordance with that of England and Massachusetts.

In *Hyatt* v. *Allen*, 56 N. Y. 553, the defendant by a contract made August 11, 1871, under which he transferred to the plaintiffs certain stock in a manufacturing corporation, agreed to pay them all profits and dividends of and upon the stock up to the 1st day of January, 1872." In April, 1872, the corporation declared a dividend of fifteen dollars a share, five-sixteenths of which were found by a referee to have been derived from the increase in value of its property between August 11, 1871, and January 1, 1872; and the court below gave judgment for the plaintiff, for that proportion of the dividend. But the Court of Appeals reversed the judgment and said: "A shareholder in a corporation has no legal title to the property or profits of the corporation until a division is made." "When, therefore, a contract is made in relation to dividends or profits, it must be deemed to have reference to dividends or profits to be ascertained and declared by the particular company, and not to growing profits from day to day, or month to month, to be ascertained upon an investigation by third persons, or courts of justice, into the accounts and transactions of the company." 56 N. Y. 557, 558.

In *Williams* v. *Western U. Teleg. Co.*, 93 N. Y. 162, the Court of Appeals, in the course of an elaborate discussion of the right of a corporation when unrestrained by statute, to make a stock dividend, said: "When a corporation has a surplus, whether a dividend shall be made, and if made, how much it shall be, and when and where it shall be payable, rest in the fair and honest discretion of the directors, uncontrollable by the courts." "Whether they shall be made in cash or property must also rest in the discretion of the directors."

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"Desiring to use the surplus and add it to the permanent capital of the company, and having lawfully created shares of stock, they could issue to the stockholders such shares to represent their respective interest in such surplus." "After a stock dividend a corporation has just as much property as it had before. It is just as solvent and just as capable of meeting all demands upon it. After such a dividend the aggregate of the stockholders own no more interest in the corporation than before. The whole number of shares before the stock dividend represented the whole property of the corporation, and after the dividend they represent that, and no more. A stock dividend does not distribute property, but simply dilutes the shares as they existed before." 93 N. Y. 189, 192.

Finally, in *Kernochan*, 104 N. Y. 618, the Court of Appeals applied the same rules as between the remainderman and the person entitled for life to the income of shares bequeathed in trust; rejected the test of determining what part of a cash dividend should be deemed principal and what part income by ascertaining how much was earned before and how much after the death of the testator; approved the general principle laid down in the cases of *Barton's Trust*, L. R. 5 Eq. 238, 245, and *Sproule* v. *Bouch*, L. R. 29 Ch. Div. 635, 653, above cited, and said: "From the shares in question no income could accrue, no profits arise to the holder, until ascertained and declared by the company and allotted to the shareholder; and that act should be deemed to have been in the mind of the testator, and not the earnings or profits as ascertained by a third person, or a court, upon an investigation of the business and affairs of the company, either upon an inspection of their books or otherwise." "The rule is a reasonable and proper one, which limits the rights of a stockholder to profits by the action of the managers of a corporation or company. It is their sole and exclusive duty to divide profits and declare dividends whenever, in their judgment, the condition of the affairs of the corporation renders it expedient; and it would lead to great

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embarrassment and confusion if a court should undertake to interfere with their discretion so long as they do not go beyond the scope of their powers and authority." 104 N. Y. 628, 629.

In *Earp's App.*, 28 Pa. 368, on the other hand, the Supreme Court of Pennsylvania declined to follow the early English cases, and adopted the rule, that where a corporation, after having accumulated large surplus profits for many years before and since the death of the testator, increased its capital stock and issued additional shares to the stockholders, so much of the surplus profits as had accumulated in the lifetime of the testator, should be deemed capital, and so much as had accumulated since his death should be deemed income; and in *Wiltbank's App.*, 64 Pa. 256, where a corporation voted to increase its capital stock by an issue of new shares to be subscribed and paid for by the stockholders, and a trustee holding shares, sold the right to take some new shares, and took others and sold them at an advance, that rule was carried so far as to hold that the sums so received by the trustee, were income of the old shares, for the reason that the right to subscribe to new shares, the court thought, "was not a part of the capital of the old stock, but a mere product of an advantage belonging to it," "a right incidental to the stock and therefore income." The rule upon which those two cases proceeded has since been treated as settled in Pennsylvania, although there has been some difficulty, if not inconsistency, in applying it; and in one case Mr. Justice PAXSON, now chief justice of Pennsylvania, spoke of both those cases as exceptional and depending on peculiar circumstances. *Moss's App.*, 83 Pa. 264, 269, 270; *Biddle's App.*, 99 P. 278; *Vinton's App.*, Id. 434. The only other states, so far as we are informed, in which the Pennsylvia rule prevails are New Jersey and New Hampshire. *Van Doren* v. *Olden*, 19 N. J. Eq. 176; *Ashhurst* v. *Field*, 26 N. J. Eq. 1; *Van Blarcom* v. *Dager*, 31 N. J. Eq. 783; *Lord* v. *Brooks*, 52 N. H. 72; *Pierce* v. *Burroughs*, 58 N. H. 302, 303. Upon the grounds already stated, that rule appears to us to be

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open to grave objections, both in principle and in application, as well as opposed to the weight of authority.

In the case at bar, the testatrix bequeathed to her daughter, Jane Owen Mahon, two hundred and eighty shares of stock, in the Washington Gas-Light Co., as well as some shares in an insurance company and bonds of the United States, "in trust for the advantage and behoof of" her daughter, Mary Ann Gibbons; and directed that after the decease of the testatrix the trustee should "cause the dividends of said stock and the interest of said bonds, as they accrue, to be paid to my said daughter, Mary Ann Gibbons, during her lifetime, without percentage of commission or diminution of principal, and in case of the death of the said Mary Ann Gibbons, then the said stock, bonds and income shall revert to the estate of my said daughter, Jane Owen Mahon, without incumbrance or impeachment of waste."

Upon the face of the will it is manifest that the testatrix used the word "dividends" as having the same scope and meaning as "income" and "interest" and nothing more, and intended that the plaintiff, as equitable legatee for life, should take the income, and the income only, of the shares owned by the testatrix at the time of her death; and that the whole capital of those shares, unimpaired, should go to the defendant, as legatee in remainder.

The admitted facts present the following state of things. The accumulated earnings of the company were kept undivided and actually added to the capital of the corporation, by investing them from time to time in its permanent works and plant, until the value of the works and plant amounted to a million dollars; no owner of particular shares, or of any interest therein, had the right to compel the company to divide or apportion those earnings; and while they remained so undivided and invested the capital stock of the company was increased to the same amount by the Act of Congress of May 24, 1866. The greater part of the earnings in question had been so invested before the

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making of the will and the death of the testatrix in 1865; a still larger proportion before the passage of the Act of Congress of 1866, and the whole before the resolution of the directors of November 1, 1868, under which the new shares were issued to the defendant, and in which it was recited in accordance with the truth, that the construction account of the company exceeded $1,000,000, and that its capital had been increased by Act of Congress to that amount, and it was therefore "resolved, that the increased stock be awarded among the stockholders, share for share, as they stood on the 1st October, 1868."

To hold the plaintiff to be entitled to the whole of the new shares issued to the defendant would be to allow the plaintiff the exclusive benefit of earnings, the greater part of which had accrued, and had been invested by the company as capital before her interest had begun, and would be contrary to all the authorities. To award her a proportion of those shares, based upon an account of how much of those earnings actually accrued after the death of the testatrix, would be to substitute the estimate of the court for the discretion of the corporation, lawfully exercised through its directors, and would be open to the practical inconveniences already stated.

The resolution is clearly an apportionment of the new shares as representing capital, and not a distribution or division of income. As well observed by Mr. Justice JAMES, delivering the opinion of the court below: "Certificates of stock are simply the representative of the interest which the stockholder has in the capital of the corporation. Before the issue of these two hundred and eighty new shares, this trustee held precisely the same interest in this increased plant in the capital of the corporation that she held afterwards. She merely had a new representative of an interest that she already owned, and which was not increased by the issue of the new shares. A dividend is something with which the corporation parts, but it parted with nothing in issuing this new stock. It simply gave a new evi-

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dence of ownership which already existed. They were not in any sense, therefore, dividends for which this trustee had to account to the *cestui que* trust. She stood after the issue of new shares just as she had stood before; and the trustee was obliged to treat them just as she did, namely, as a part of the original, and to pay the dividends to the *cestui que* trust." 4 Mackey, 136.

Decree affirmed.

Mr. Justice BREWER, not having been a member of the court, when this case was argued, took no part in the decision.

See, also, Accounting of Gerry, 5 Am. Prob. Rep. 55, and Matter of Kernochan, 5 Am. Prob. Rep. 260, and the note and cross-references.

SIMMONS *vs.* BEAZEL.

(125 Indiana, 362.)

CONSTRUCTION OF WILL.

A bequest by a testator of "all the personal property which I may have at my death" covers the proceeds of real estate subsequently disposed of by testator.

APPEAL from Circuit Court, Noble County; A. A. CHAPIN, Special Judge.

P. V. Hoffman and *F. P. Bothwell* for appellants.

L. D. Fleming and *R. W. McBride*, for appellees.

BERKSHIRE, C. J. This was a proceeding commenced by Nancy Simmons, executrix of the last will of Jonathan Simmons, against the heirs and legatees of the decedent to have the testator's will construed.

After issue formed there was a trial, and at the in-

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stance of the parties the court made a special finding. The appellants excepted to the court's conclusions of law, after which the court rendered judgment.

A preliminary question to the consideration of the questions involved in the appeal is raised by a motion to dismiss the appeal. The contention is that the appeal is governed by the provisions of the decedent's act, and was therefore not taken in time. We think otherwise. It falls within the rule declared in *Koons* v. *Mellett*, 121 Ind. 585, 23 N. E. Rep. 95. There is but one error assigned, which is error committed by the court in its conclusions of law.

After the rendition of said judgment, but before this appeal, the executrix, Nancy Simmons, departed this life testate, and the appellee Alvin Beazel had been appointed her executor, and said executor and his co-appellee, being the only persons having an adverse interest to the appellants, were served with notice of the appeal, and they appear as the appellees thereto.

In items 4 and 5 of the will of the testator, Jonathan Simmons, certain real estate was directed to be sold, and a disposition of the proceeds arising therefrom made. Afterwards the testator conveyed said real estate, and at the time of his death held certain promissory notes, a part of the proceeds arising from said conveyance; and the question is, whether said notes passed, by clause 1 of said will, to his widow, it being the contention of the appellants that as to said notes the testator died intestate.

On the 5th day of July, 1881, the said testator executed his will as follows:

"In the name of God, Amen. I, Jonathan Simmons, of Ligonier, Noble county, Indiana, do make and publish this as my last will and testament.

ITEM FIRST. I give and bequeath to my beloved wife all the personal property which I may have at my death.

ITEM SECOND. I give and devise to my beloved wife lot numbered twenty-two in Chapman's addition to the town of Ligonier, in Noble county, Indiana, during her natural life.

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ITEM THIRD. It is my desire that my just debts, including my last sickness and funeral expenses, be paid by my wife, out of my personal property, which shall include all my growing crops, and crops on hand, and notes, save such as I hold against my own children, which notes shall be treated as advancements, and be deducted out of their respective shares.

ITEM FOURTH. It is my desire that, as soon after my death as possible, my executrix shall sell all of my real estate, except lot numbered twenty-two in Chapman's addition to Ligonier, upon such times and terms as may seem to him or her for the best interest of my heirs; and out of the sale of said real estate there shall be paid to my beloved wife the sum of three thousand dollars, which sum of $3,000 shall be paid to her out of the first payment made thereon.

ITEM FIFTH. The balance that may remain of my real estate after paying my said wife the sum of three thousand dollars shall be equally divided between my children or their heirs, share and share alike, first deducting from their respective shares the sum or sums already advanced by me.

ITEM SIXTH. At the death of my said wife, lot numbered twenty-two, in Chapman's addition to Ligonier, I shall give and devise to my children, or their heirs, share and share alike.

ITEM SEVENTH. I do hereby appoint my wife, Nancy Simmons, executrix of this my last will and testament, with full power to do and to act as such executrix."

Then follows the formal conclusion usually found in such writings.

On the 28th day of July, 1883, the testator added the following codicil to his will:

"I do hereby give and devise to my beloved wife the lot on which we live, to wit, lot numbered fifty-seven in the original plat of the town of Ligonier, in Noble county, Indiana, during her natural life; and at her death the same shall go to my heirs, share and share alike, as set forth in the will."

In view of the conclusion which we have reached,

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it does not become necessary to consider the question as to whether the will disposed of all of the real estate held by the testator at the time of his death not otherwise disposed of, or only such as he owned when the will was executed. But see *Sturgis* v. *Work*, 122 Ind. 134, 22 N. E. Rep. 996.

The real estate which he owned at the date of the codicil was the only real estate of which he died the owner, and the codicil disposed of such as was not expressly devised by the original will.

The provisions of the will relating to the real estate owned by the testator when he executed the original will, and thereafter conveyed, were by such conveyance rendered inoperative.

It is evident from the terms and conditions of the original will, and the codicil as well, that it was the intention of the testator to dispose of his entire estate.

Had the conditions remained unchanged after the execution of the original will until the testator's death, there can be no question but that the provisions of the will would have carried the entire estate.

Whether lot numbered 57 in Ligonier, which he acquired after the execution of the original will, would have fallen under the provisions found in clauses 4 and 5 therein is not material, for the reason that by the codicil this after-acquired real estate was devised in a different direction.

The first clause of the will gave to the widow all of the personal estate of which the testator might die the owner.

There can be no mistake as to the intention of the testator as expressed in this item of the will.

We will quote it again and emphasize it:

"I give and bequeath to my beloved wife *all the personal property which I may have at my death.*"

This language is broad enough and emphatic enough to cover his personal estate of every kind, and derived from whatever source.

Had the testator increased his personal estate in any other manner than by the sale of his real estate

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after the execution of his will, there can be no question but what all that he possessed at the time of his death passed to his widow, subject to the demands of creditors, under the first clause of the will. There is no contention to the contrary, and can be none.

If this is so, we can discover no sufficient reason for excluding the proceeds of the real estate sold.

The testator was at liberty to dispose of his property, real and personal, notwithstanding his will. When he disposed of the real estate, or any of it, the portions of the will relating thereto were annulled, the conditions were the same as they would have been had such real estate not been mentioned therein.

Suppose, when the original will was executed, the fourth and fifth clauses therein had been omitted, and suppose, further, that the testator had died without disposing of said real estate, as to it he would have died intestate, and it would have descended under the law to his lawful heirs. But if we suppose that clauses 4 and 5 had been omitted from the will, and thereafter (as he did do) the testator had converted the real estate therein referred to into money, it seems to us that there can be no question but what the widow would have taken the same, under clause 1 of the will. Indeed, the will might have been executed in the form supposed with a view to a sale of the real estate, and a disposition of the proceeds under said first clause.

The broad and emphatic language of the testator is not open to construction. It disposed of all his personalty, and the other portions of the will of all of the testator's real estate.

We are of the opinion that there can be no question but what the notes given for the real estate, and held by the testator at the time of his death, were a part of the wife's legacy.

We find no error in the record.

Judgment affirmed, with costs.

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ROY *vs.* MONROE.

(47 New Jersey, Equity 356.)

CONVERSION—DESCENT OF REALTY.

If the direction of a will as to the proceeds of the sale of land require land to be sold, the direction is equivalent to a positive command to sell, and the land will for the purposes of the will, be deemed to be personalty. Money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted. Where a testator orders his land to be sold, the conversion will, unless a contrary intention distinctly appears, be deemed to have been directed merely for the purposes of the will; and consequently, if any of those purposes fail, so that the money does not pass under the will, it will in equity, be considered land, and be given to the heir.

Land, in its devolution by descent, always follows blood. A residuary legatee, as a general rule, is entitled to all legacies not effectually disposed of by the will; but, to be thus entitled, he must be the general legatee of the testator's whole residuary estate. Where the testator has confined his gift of residue to a particular part of his estate, and excluded another part, the excluded part will not pass under the gift of residue.

ON final hearing on bill and answers.

Joseph F. Randolph and *Frederic W. Stevens*, for complainants.

John R. Emery, for Josephine McKee and others; *Edmund D. Halsey*, for himself.

VAN FLEET, V. C. This is a contest between heirs at law and next of kin, and the principal question to be decided is, which set of claimants are entitled to the property in dispute? The facts necessary to be considered in deciding this question are the following: George W. Greenmyre died testate in September, 1876. His will bears date about a year before his death. He left an only child, George W. Greenmyre, Jr., and a widow. By his will, after directing the payment of his debts and funeral expenses, he gave all his

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property, real and personal, to his executors "in trust," as his will says:

"To carry out the directions and bequests of this my will; and I hereby authorize them to sell at public or private sale, and upon such terms, at such times, and for such prices, as they may think best, all my real estate, and to give deeds for the same."

He next directs his executors to pay the net income of his estate to his wife, for the joint support of herself and his son, until his son shall arive at the age of 21 years. He then makes a gift of all his estate, real and personal, to his wife and her heirs, in case his son shall die before he attains 21 years of age. And then his will says:

"When my son attains the age of twenty-one years, then I desire my executors to take from my estate the sum of $10,000, and the residue of my estate pay over or convey to my son. Said sum of $10,000 I direct my executor to invest, and keep invested, and the interest and dividends arising and accruing therefrom pay over to my son, but not to any creditor or assignee of his, upon his sole and personal receipt, during his natural life, and, at his death, pay said sum of $10,000 to his children."

This is the whole of the will, except the clause by which the widow and Edmund D. Halsey were appointed executors. The widow renounced, and Mr. Halsey proved the will alone.

The testator died possessed of a very trifling amount of personal property, but he held title in his own right to two parcels of land. The executor conveyed one of the tracts in 1880, for $165, and the other on the 20th day of August, 1888, for $17,500; but the tract last conveyed was subject to a mortgage for $6,000, made by the testator, so that the amount realized from that tract, for the estate of the testator, was only $11,500. The testator's only child was born on the 13th day of May, 1863, and consequently attained full age on the 12th day of May, 1884. He died intestate on the 27th day of August, 1888, more than four years after he

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had attained full age, and only seven days after the executor made the last conveyance. He died without issue, never having been married. His mind was weak. Prior to the death of his father, he had been placed in an institution organized for the care and education of feeble-minded persons, and remained there up to the time of his death. He died in the institution. His mother, the testator's widow, died on the 30th day of November, 1886. She left four daughters, the offspring of a prior marriage. She was a widow when the testator married her. These daughters were George's half-sisters. They are not, however, of the blood of the testator. The complainants are. They were the testator's sisters, and George's aunts. The persons standing nearest in blood to the testator, at the time of his death, were—*First*, his son; and, *second*, his two sisters, the complainants. He left no other sister, nor the descendant of a sister, nor a brother, nor the descendant of a brother. The executor has filed his final account, showing a net balance in his hands of $10,763.33. This balance consists entirely of the proceeds of the sale of real estate. In this posture of affairs, it is clear that, if the property in dispute still retains, as between the contestants, the character of land, the complainants are entitled to it; and this will be so, although the fact may be that the land has been converted into money, pursuant to the direction of the testator.

The land was sold pursuant to the direction of the testator. It is true, in that part of his will in which the testator gives direction as to the disposition to be made of his land, he does not give an imperative order for its sale, but simply authorizes his executors to sell it, yet, by a subsequent direction which he gave, he made it impossible to execute the principal provision of his will, as he manifestly intended it should be executed, until his land was sold. The provision here referred to is that in which the testator orders his executors when his son attains 21 years of age, to take $10,000 from his estate, and invest it, and pay the in-

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come arising from it to his son during his life, and the principal to his children, on his death. In view of the fact that the estate consisted entirely of land, and that the land could not, without sacrifice, be sold in parcels, and was only worth about enough to pay the mortgage on it, and raise the $10,000, it is plain that this provision of the will could not be carried into effect unless the land was sold. The condition of the testator's estate, and the requirements of his will, created an exigency which was in all respects equivalent to a plain and positive command to sell. The rule on this subject is settled. Said Chancellor ZABRISKIE in *Cook's Exr.* v. *Cook's Admr.* 5 C. E. Gr. 375, 377: "When land is directed to be sold, absolutely and positively, without any time fixed for the sale, it is considered as converted into money from the death of the testator; but for this the direction must be imperative. If it is optional with the executor whether to sell or not to sell, or if it is only an authority to sell, without any direction, then the land retains its character as land until it is actually sold. If the direction of the will as to the proceeds require a sale, it is equivalent to a positive direction to sell, and the land is deemed personal property from the death of the testator." In the previous case of *Wurts' Ex'rs* v. *Page*, 4 C. E. Gr. 365-375, the same chancellor had stated the rule in substantially the same way, and Chancellor MCGILL, in *Dutton* v. *Pugh*, 18 Stew. 426-428, 18 Atl. Rep. 207, adopted the statement of it made in *Cook's Exr.* v. *Cook's Admr.*, as an established principle of equity jurisprudence.

No doubt can, therefore, be entertained, I think, that the money in dispute here must be regarded as having been converted from land into money by the direction of the testator, and that it must accordingly be held, in conformity to well established principle, that, so far as the testator has disposed of the money thus raised, it must pass to those who are entitled to take under his will as personalty, and not as land. For, as the leading case on this subject declares, nothing is better established than this principle: that money

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directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted. *Fletcher* v. *Ashburner*, 1 *Lead. Cas. Eq.* (*4th Amer. Ed.*) 1120. This principle is the natural result of the dominion which the law confers upon every property owner who is *sui juris* over that which he owns in his own absolute right. He has power to do with his own whatever he pleases, so long as he does not attempt to apply it to uses forbidden by law, and in the exercise of this power he has a right to decide what shall be the nature of his property after his death, and who shall take it, and whether they shall take it as land or as personalty. By force of this principle, it is clear, I think, that the testator's son, on attaining 21, became entitled to the whole of the testator's estate except the $10,000, and that he took such residue as personalty. The direction of the will is that, when the son attains the age of 21 years, the executors shall take $10,000 from the estate, and then, in the language of the will: "And the residue of my estate pay over or convey to my son." The direction to pay or convey would indicate that the testator meant that his son should take the residue, either in money or land, in whichever form it might exist when he became entitled to it; but, as it was impossible, in consequence of the condition of the testator's estate, and the nature of the property which he left, to raise the $10,000 without selling all his lands, and as equity regards that as done which ought to have been done, it would seem to be clear, according to the principle which must rule in such cases, that the residue, by force of the will, became personalty on the day the testator's son attained full age. There can be no question that, if the will had been executed just as the testator meant it should be, the residue of his estate would, on the day his son attained full age, have consisted entirely of personalty. My judgment is that the residue passed to the son as personalty, and hence so much of the fund in controversy, as represents the residue must be awarded to the son's administrator.

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But the $10,000 stands in an entirely different situation. Though the land which this sum represents was changed, by a direction contained in the testator's will, from land to money, yet it has so happened that his will does not, in the present situation of affairs, dispose of the money. The testator ordered the conversion for two purposes—*first*, that his son, during his life, might have the income arising from the money; and, *second*, that the principal on his son's death might go to his son's children. The first purpose has been fully accomplished. The second, however, has not been, and never can be. The son died without issue. The $10,000 is therefore undisposed of. As to it, the testator died intestate, that is, in the condition of affairs now existing, it must be declared that he had no will concerning it, and made no testamentary disposition of it; and consequently nobody can claim it under his will. It thus appears that the main purpose of the conversion has failed. Where that is the case, the principle which must govern the judgment of the court in disposing of the money is, as I understand the authorities, firmly and clearly established, and may be stated as follows: The money must, for the purposes of succession, be regarded as possessing precisely the same heritable or transmissible quality or character which the property it represents had at the death of the testator, and it must be given to the heir if it represents land, and to the next of kin if it represents personalty, unless the testator has, in his direction for conversion, plainly declared that his intention in directing a conversion was not merely to change the nature of his property for the purposes of his will, but to change it for all purposes, whether it passed under the will or not. An early statement of this principle is found in the decision of Sir JOSEPH JEKYLL, master of the rolls, in *Cruse* v. *Barley*, 3 P. Wms. 20, but of course the leading case on the subject is *Ackroyd* v. *Smithson*, 1 Lead. Cas. Eq. (4th Amer. Ed.) 1171. That is the case in which Lord THURLOW was compelled, by the convincing force of the argument of the barris-

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ter who afterwards became one of England's most distinguished equity judges, to decide, contrary to his first impression, in favor of the right of the heir. The most accurate statement of this principle, at least the one which is generally esteemed the most accurate, is that given by Mr. Cox in his note to *Cruse* v. *Barley*. "The several cases on this subject," this note says, "seem to depend upon this question: Whether the testator meant to give the produce of the real estate the quality of personalty to all intents, or only so far as respected the particular purposes of the will; for, unless the testator has sufficiently declared his intention, not only that the realty shall be converted into personalty for the purposes of the will, but, further, that the produce of the real estate shall be taken as personalty, whether such purposes take effect or not, so much of the real estate, or the produce thereof, as is not effectually disposed of by the will at the time of the testator's death (whether from silence or inefficacy of the will or from subsequent lapse), will result to the heir." Jarman, in his treatise on *Wills*, while conceding the substantial accuracy of this statement of the doctrine, says that it is not sufficiently explicit, and that, in order to make it a safe guide, this addition should be made to it:

"But that every conversion, however absolute in its terms, will be deemed to be a conversion for the purposes of the will only, unless the testator distinctly indicates an intention that it is, on the failure of those purposes, to prevail as between the persons on whom the law casts the real and personal property of an intestate, namely, the heir and next of kin." 2 *Jarm. Wills*, (Rand. & T. Ed.) 216.

The American editors of Leading Cases in Equity (vol. 1, 4th Amer. Ed., 1197) state the principle in this form:

"The conversion of property, from one species to another, by the will of a testator, takes place only for the purposes of the will; and, so far as those purposes do not extend, or in so far as any of them do not take effect in fact or in law, the property is considered as

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remaining in its former condition, as it was in the hands of the testator, and passes accordingly."

"This principle has been recognized by the court of errors and appeals of this state. The chief justice, in delivering the opinion of that court in *Lerch* v. *Oberly*, 3 C. E. Gr. 575-578, said: "The principle is established by a multitude of cases that where real estate is directed, either by the owner or by the order of the law, to be converted into money for a particular object, and a surplus remains after the accomplishment of such object, such surplus, as between the heir and the personal representative of such owner, will be regarded by a court of equity as land, and will descend as such." It is an obvious dictate of justice, as well as of common sense, that the direction to convert shall be held to have terminated whenever it becomes impossible to carry out the purpose for which the conversion was ordered, and that when the property, in its changed form, cannot pass by the will which directs its conversion, but must be transmitted by the law, it should go to the person who would have taken it if it had not been converted, but still remained in its original condition.

Adopting this principle as the rule of judgment, it is plain that the $10,000 must be held to be land, and as such must be awarded to the heirs at law. The conversion was ordered merely for the purposes of the will. That, in my judgment, is clear beyond dispute. The will contains not the least trace or indication that the testator meant that the nature of his property should be changed for any other purpose. As Lord ELDON, in substance, said in his masterly argument in *Ackroyd* v. *Smithson*: It is not necessary for the heir, in a case like this, to deny that the intention of the testator designed him nothing. His intention has certainly been equally unpropitious to his next of kin. But, to disinherit the heir, it is not enough to show that the testator did not intend that he should take; but to do that it must be shown that the testator made a disposition in favor of another. It is both unneces-

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sary and unimportant in this case to decide whether the property in question first passed to the testator's son, and then, on his death, from him to the complainants, or directly from the testator to the complainants. No matter what its course was, there can be no doubt, according to the principle which determines its nature, that it passed as land; and, as the defendants are not of the blood of the person from whom it came, they cannot take it. Land, in its devolution by descent, always follows blood.

The case thus far has been dealt with on the foundation on which it is presented in the pleadings. The defendants, by their answer, admit that, in the actual state of affairs which has occurred, the testator died intestate as to the $10,000, and the argument originally made proceeded on that basis. Since then a further argument has been made, in which it was contended that the testator did not die intestate as to the $10,000, but, as that sum was not well disposed of by the will, it passed under a well-settled rule of construction, to his son, by force of the gift of the residue made to him. There can be no doubt that, according to an established canon of construction, the residuary legatee is entitled, unless a contrary intention be manifested, to take all legacies not effectually disposed of by the will, whether the failure of the gifts, which, under this rule, go in augmentation of the residuum, be the result of lapse, or the inefficacy of the will, or the illegalty of a particular bequest; but it is equally well settled that a residuary legatee, to be thus entitled, must be the general residuary legatee of the testator's whole residuary estate. If the testator has circumscribed or confined the residue which he makes the subject of his gift to his residuary legatee, then his residuary legatee is not a general, but a specific, legatee, and can only take that part of the residue specifically pointed out in the gift to him; or, as was said by Justice DALRIMPLE, in delivering the opinion of the court of errors and appeals in *Tindall's Ex'rs* v. *Tindall*, 9 C. E. Gr. 512, 513: "Where the words used show an in-

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tention on the part of the testator to exclude from the operation of the residuary clause certain portions of his estate, the residuary legatee will not take such portions." To the same effect is the opinion pronounced by Lord COTTINGHAM in *Easum* v. *Appleford*, 5 Mylne & C. 56, 61, where, in effect, he said, to take everything which the will does not pass, the residuary legatee must be a general legatee; and, if the testator has circumscribed or confined his gift of residue to a particular part of his estate, his residuary legatee, in stead of being a general legatee, becomes a specific legatee. The rule, as thus stated, is firmly established. 2 *Williams, Ex'rs*, 1461; 2 *Jarm. Wills*, (Rand. & T. Ed.) 365. As is obvious, this is the only rule that can be prescribed which will leave in full vigor, and preserve inviolate, that perfect power of testamentary disposition which the law confers upon every citizen of full age and sound mind.

Taking this rule as the guide, I do not think it can be held that the $10,000 passed to the testator's son as part of the gift of residue made to him; on the contrary, I think it is clear, beyond dispute, that the testator meant to exclude the $10,000 from his gift of the residue, and that he has said so in language so simple and direct as to exclude all possibility of doubt as to his meaning. The gift of residue is made in these words:

"When my son attains the age of twenty-one years, then I desire my executors to take from my estate the sum of $10,000, and the residue of my estate pay or convey to my son."

This language limits, in the most explicit manner, the thing or part given as residue to what shall remain of the estate after a specific sum is deducted, so that the means which the testator has directed to be used to fix the *quantum* or extent of the residue necessarily excludes the $10,000. Until the $10,000 are taken out, there can be no residue; and it is only what is left after the $10,000 are taken out that is given by way of residue. In the language of the court of errors and

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appeals in *Tindall's Ex'rs* v. *Tindall*, the words of the gift show an intention on the part of the testator to exclude from the operation of the residuary clause of his will a certain part of his estate, and, where that is the case, the residuary legatee cannot take the excluded part. To hold that the testator's son took the $10,000 under the will would be giving him that part of his father's estate which his father, by his will, has said he should not have. That would be making a will for the father, rather than construing the will which he made.

The complainants are entitled to the $10,000. As each of the two sets of claimants have been partly successful, I think neither should be allowed costs against the other. The executor should, however, be allowed costs. The complainants, by their bill, impugned his conduct, and thus compelled him to answer in order to defend himself. But for this he might have remained silent with propriety. I think he should therefore be allowed his costs out of the sum awarded to the complainants.

BATES *vs.* GILLETT.

(132 Illinois, 287.)

CONTINGENT REMAINDER—LACHES—NOTICE.

Under a devise of land to testator's daughter for life, "and, after the death of either of them, their share to be equally divided amongst their children or their descendants," the heirs of a child of one of the daughters, which died during its mother's life, take no estate, since the remainder does not vest until the death of the daughter. A lapse of nearly 20 years in asserting title to an interest in land, during which time the claimant has, as the guardian of his sons, treated the land as belonging wholly to them, bars his right, in equity, to assert his claim.

Notice that a person claims an interest, as heir in land which has been devised to another on the ground that the will is invalid, is no notice that such person also claims an interest in the land undersuch will.

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APPEAL from circuit court, Logan county; GEORGE W. HERDMAN, Judge. Bill for partition by William G. Bates, D. H. Harts, and Robert Humphrey against John D. Gillett, Richard J. Oglesby, and William C. L. Bates. Decree for defendants. Complainants appeal.

Harts & Humphrey, for appellants.

Blinn & Hoblit, for appellees.

SHOPE, J. Complainants' claim is, that the son of William G. and Sophronia C. Bates, who died in infancy, took, under the will of his grandfather, John Lorence, a one-fourth interest in the lands devised for life to his mother, and after her death to her children and descendants, and that, upon the death of said child without brothers or sisters at the time of his death, said interest descended to his father and mother in equal shares; that under the law said William G. Bates had an estate by the courtesy initiate in the share descending to his wife, which became consummate upon her death, in the year 1867—so that, at the time of filing the bill in this case, he was seized of one-eighth of the land set off to said Sophronia and her children in fee, and a life estate in one-eighth thereof as tenant by the courtesy. If the estate vested in interest in the children of Sophronia C. Bates upon their birth, the contention of complainants that said William G. Bates took an interest as heir at law of his deceased son, and as tenant by the courtesy in the estate in like manner descending to his wife, cannot be disputed. If, however, the estate in remainder became vested in interest upon the termination of the life estate of said Sophronia, or at a period subsequent to the death of said infant son, he would take no interest in said land, and complainant's bill was improperly brought. The question for consideration is, therefore, when did the estate in remainder vest in interest? This must be determined from a consideration of the will of John Lorence, taking into view the whole will, and giving

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to each part of it, and to the phrases and words employed, their proper effect and meaning. The testator first devises certain rents for a limited period, and then, subject to such devises, gives one-third of his real estate, wherever situated, to his widow for life, who having died during the life-time of the testator, the devise to her need not be further considered. After the devise to the wife of one-third of all his real estate for life, the will proceeds: "And the remainder thereof, (all his real estate) together with the one-third devised to my wife, after her death, I devise to my three children equally, to be divided between them, to have and to hold to them for their lives; and, after the death of either of them, their share to be equally divided amongst their children or their descendants, giving to the descendants of each child one share. * * * I devise to my son, Walter Balfour Lorence, one-third part of all my real estate in fee-simple, to him and to his heirs; it being my will and intention that my estate, subject to the devise aforesaid to my wife, be equally divided amongst all the children I may leave, the personal estate in fee-simple, and the real estate to the boys in fee-simple, and to the girls for life, and the remainder to their children and descendants."

Whatever seeming contradiction there may appear to be in the foregoing extract will, upon close analysis, be found not to exist in respect to the devise to the daughters. The former provision gives to his three children equally, for life, with remainder after the death of either of them "to their children or their descendants, giving to the descendants of each child one share," while the later or explanatory clause provides that the real estate of the testator shall go "to the boys in fee-simple, and to the girls for life, and the remainder to their children and descendants." It is clear that the estate devised to the daughter was a life-estate, only. If the words "to their children or their descendants" were to be regarded as controlling, and full effect given to the disjunctive "or," it might have the effect to create an alternative devise to the de-

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scendants of the daughter other than her children, and be held to import a condition which could not be determined until the period of distribution had arrived. (*Gittings* v. *McDermott*, 2 Mylne & K. 69; *Selby* v. *Whittaker*, 6 Ch. Div. 246; *Robb* v. *Belt*, 12 B. Mon. 643; Williams, Ex'rs, 141; Redf. Wills, 486, 487.) But we do not deem it important to determine whether such words indicate a clear intention on the part of the testator to substitute the issue of such of the children of the said Sophronia as might die during the continuation of the life estate, leaving issue, for such children of Sophronia so dying, or not, for a consideration of the later words employed by the testator, giving a life estate to his daughters, "and the remainder to their children and descendants," in connection with the context, will be found to produce the same result; that is, to indicate a clear intention on the part of the testator to postpone the vesting of the remainder in interest until the termination of the intermediate estate.

At the time of making the will, and when the devise of the life estate took effect by the death of the testator, the daughter Sophronia was unmarried, and there was no person in existence to take the remainder under the will. According to the modern doctrine, there being no person *in esse* to take, the remainder vested, upon the death of the testator, in his heirs at law, subject to be divested when the will became operative as to such remainder. Primarily, the vesting of the remainder under the will depended upon the birth of children of the body of Sophronia. If she had died without issue the estate would have descended as intestate estate to the heirs at law of the testator. (See, 4 Kent, Comm. 207; Tied. Real Prop. § 397.) Subsequent to the death of the testator, his daughter, Sophronia, married the said William G. Bates, and there was born, issue of such marriage, a male child, who, it is shown, died within 24 hours of its birth; and, as we have seen, the interests of complainants rest solely upon the question of whether this child took a

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vested interest in the remainder, under the will of its grandfather, in the lands in controversy. It should be remarked here that, subsequently to the death of said child, three other children were born, issue of said marriage and who survived their mother, Sophronia, and in whom the estate, it is claimed, became vested, under said will, upon the death of their mother.

Among contingent remainders are those in which both the title and possession are postponed until the happening of some uncertain event, or where it is to vest upon an event certain, in dubious or uncertain persons. Ordinarily, when the remainder is limited to a class, some of whom are *in esse*, the remainder will be held to be vested, liable, however, to open and let in those born during the continuance of the particular estate, and falling within the class. However, "the general rule is that a remainder is contingent if the persons who are to take are not *in esse*, or are not definitely ascertained." (Tied. Real Prop. § 402; 4 Kent. Comm. 207.) No further discussion of the rule in respect of contingent remainders will be necessary. It is evident that under this will the remainder could vest in possession only upon the termination of the life estate, and such would have been the effect if the testator had used no other language than was sufficient to create the life estate with remainder over. We find, however, that the devise is to the daughters of the testator for life, "and after the death of either of them" their share is to be equally divided among their children, etc. It seems clear that the testator had in his mind a division of his estate among the children and descendants of the life tenant after her death. It cannot be presumed that the testator used language without a purpose, or without intending thereby in some way to affect the disposition of his estate. It is *after* the death of Sophronia that her share is to be equally divided among her children and descendants. It is undoubtedly the rule that, where the testator speaks of the devise taking effect "after" or "upon the death" of the tenant of the particular estate, such

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words will ordinarily, if standing alone in the will, be construed as referring to the time when the estate will vest in possession only; but it is always proper to consider them in connection with the context to determine the intent of the testator in respect of when the estate shall vest in interest.

It is also to be observed, taking the construction of the will most favorable to complainants, that the division, whenever made or to be made, was to Sophronia's "children and descendants." Now, children are *co nomine* descendants, but it by no means follows that descendants are necessarily children. A descendant is a person who is descended from another; that is, one who proceeds from the body of another, however remotely. The word is the converse or opposite of "ascendant." (Amer. & Eng. Cyclop. Law, tit. "Descendant.") "Descendants" include every person descended from the stock referred to. It is co-extensive with issue, but does not embrace others not of issue. It is not to be understood as meaning next of kin or heirs at law, for these phrases comprehend persons in the ascending as well as the descending line, and may also include collaterals; but it does mean the issue of the body of the person named, of every degree, such as children, grandchildren, and great grandchildren, and all others in the direct descending line. (*Hamlin* v. *Osgood*, 1 Bradf. 409.) And, when the term "descendant" is used in a will, it means only lineal heirs—those in the direct descending line from the person named—unless there is a clear indication of intention on the part of the testator to enlarge its meaning. (*Barstow* v. *Goodwin*, 2 Bradf. Sur. 413; *Baker* v. *Baker*, 8 Gray, 101-119; *Walker* v. *Walker*, 25 Ga. 420. And so it has been held that "descendants" is a good term of description in a will, and includes all who proceed from the body of the person named to the remotest degree. (*Crossly* v. *Clark*, 1 Amb. 396. See *Jewell* v. *Jewell*, 28 Cal. 236.) And this is the ordinary meaning applied to the word "descendants," not only by the profession, but by the laity.

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The testator when providing for the distribution of his estate after the death of the first takers, directs its division among the children of the life tenant or their "descendants"; and, when endeavoring to make his meaning clear by the subsequent clause, again directs that the remainder over shall go to "their children and descendants." We are endeavoring to determine what was in the mind of the testator, and his intention in respect of this share of his estate; and, as we have seen, it is not to be presumed that he used words in making disposition of his estate that he did not intend to have their ordinary and usual effect and signification. Nor are we at liberty to disregard or reject as meaningless any word he has employed, unless it is so far unintelligible or repugnant to other and controlling portions of the will that no effect can be given thereto. Thus construed, it is clear to us that the testator had in contemplation the possible distribution of his estate when it should be made, to others than to children of his daughter. The testator must have contemplated the subsequent marriage of Sophronia, birth of issue of her body, and that such issue might have children and die before the estate became vested under the will. Any other construction would render the use of the word "descendants" unmeaning and useless. It would be absurd to suppose that the testator had intended or determined that the remainder should go to the children of Sophronia at their birth, in view of the language employed. If such had been his intention, the words "and to her children" would have expressed his intention definitely and accurately. If the estate vested in interest in the infant deceased child, as contended, there could by no possibility be descendants other than the children of Sophronia who could take. It follows, therefore, that who was to take was at the date of the will indefinite and undetermined; for, as we have seen, if the testator intended that at some time the remainder was to go to Sophronia's children and descendants, it depended, not only upon Sophronia's mar-

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riage and birth of issue, but he must have had in contemplation that such issue might itself have issue and decease before the period arrived at which the estate would vest. This being so, it follows necessarily that the estate in remainder was contingent, not only upon the birth of children to Sophronia, but upon their surviving the period when the estate was to vest in possession—that is, until the termination of the life estate; for until the happening of that event it could not be known who were to take. As we have seen, the devise was to a class, *i. e.*, to his daughter's children and descendants; and these words are necessarily construed as designating the objects of the testator's bounty. They would not take as representatives of the mother, Sophronia, but under the will, and as purchasers.

The conclusion can scarcely be resisted that the thought of the testator was to place his daughter's share of his estate beyond the interference or control of her husband, in the event of her marriage, and make provision alone for her and her lineal heirs. The definite intention of the testator is manifested that, so far as this interest is concerned, it should not depart out of the direct descending line until it vested in interest. There was nothing in this in contravention of the statute against perpetuity; for, as we have seen, the estate would, at the farthest, vest in interest upon the termination of a single life then in being. The devise was, here, to a class—to his daughter's children and descendants; and these words were intended to be taken distributively, as designating the objects of the testator's bounty. The class of persons who were to take was not definitely ascertained at the time of the making of the will, or at the death of the testator, or upon the birth of issue of the body of Sophronia, but depended upon the contingency of who, answering the description of the will, might be *in esse* at the period of distribution. As we have seen, the general rule is, in such case, that the contingency can only be determined when the day of distribution ar-

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rives. (Authorities *supra*. *McCartney* v. *Osburn*, 118 Ill. 416, 9 N. E. Rep. 210; *Ridgeway* v. *Underwood*, 67 Ill. 419; *Blatchford* v. *Newberry*, 99 Ill. 11; Beach, Wills, § 298; 1 Jarm., Wills, 839. The persons *in esse* falling within the description would then take, not as representatives of the mother, or by or through her, but under the will and as purchasers.

We are of opinion that, giving effect to the provisions of this will, it clearly appears that the testator intended the remainder to vest in interest in such of the issue of the body of his daughter, Sophronia, of whatever degree, that should be in being when the estate vested in possession, and that, therefore, the vesting of the estate being postponed until the termination of the life estate created by the will, the infant son under whom the complainants claim title took no interest in these lands, and was therefore incapable of transmitting any interest therein to the complainant Bates.

But, in any view that may be taken, the further question is presented by this record whether the complainants are not barred of the equitable relief sought by *laches* in asserting their claim. The first child was born October 14, 1862, and lived not over 24 hours, according to appellants' own evidence. January 22nd, 1867, the mother died, leaving these other three sons, who are yet living. April 17, 1867, the complainant Bates was by the county court of Logan county appointed guardian of these three sons. From that time until he removed to Kansas in October, 1883, he lived upon the land in controversy. When he went to Kansas he rented the land, by written lease, as the guardian of the sons; the land being therein described as "all the land occupied by said Bates, and belonging to said heirs of Sophronia C. Bates, situated," etc. This lease was ratified and approved by his minor sons and by the county court. In the various accounts he rendered to the county court, he treated the land as his sons', and in none of them does he intimate that he had any interest in the property

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whatever. In 1867 he charges himself with $779.19 rent for the land, and credits himself with $480.13 for taxes paid on the land, and for fruit trees, repairing fences, and for his personal attendance in making such expenditure. In 1868 he charges himself with rent, and damages received for the laying out of a road over the land, etc., $1,013.21, and credits himself with taxes, material, and work put upon and furnished to the land, amounting to $779.97. In 1869 he charges himself with $1,043.80, and credits himself with $1,305.50 for lumber used in the construction of two houses, for nails, fruit trees, setting the same, repairing fences, etc. Similar reports were filed for each succeeding year, in which the guardian credited himself with the improvements put on the land. During the entire period of his guardianship, it does not seem that he ever made known that he had, or claimed to have, any interest in the land. He, by his conduct and acts, held out to the world that these lands belonged to his three sons, and the evidence shows conclusively that they at all times regarded themselves as the owners.

The first claim of any interest in the land by the guardian, Bates, appears in the letter of October 11, 1886, after the termination of his guardianship, and when he learned that his sons were endeavoring to sell the land to Gillett. But in that letter his only claim is based on the invalidity of the will. He therein claims that the will was void, and that the property passed to the wife by descent, and he therefore had a life estate therein. Upon examination, this claim proved to be unfounded. If his claim had been well founded this letter would have been notice of it, but certainly was no notice of any other claim, or ground of claim, to an interest in the estate. If Bates had simply said he claimed an interest in the land, without stating the ground, the letter would have been sufficient to have put the purchaser on inquiry, and he would have been held to have had notice of such rights as were apparent in Bates. But, as Bates had already stated upon what ground he claimed interest, Gillett

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was bound only to see that claim was invalid. If he had any legal rights not disclosed by the record, it was his duty to notify Gillett of them truthfully. The record showed the title in his three sons; and his accounts as their guardian, and his entire dealings in respect of this land, so far as appears in this record, show the same thing. It seems strange that, if the first son was born alive, Bates should have been ignorant of his supposed rights for so many years. The living sons understood in the family that the first child was not born alive. The mother can not now testify. Nearly 25 years had elapsed between the birth of said child before the filing of this bill; and it is manifestly difficult, if not impossible, at this late day, to prove the fact, whatever it may be.

As a general rule, where the statute has fixed the period of limitation under which a claim in a court of law would be barred, courts of equity, by analogy, will adopt the limitation thus fixed. "A court of equity will, however, often treat a lapse of a less period than that provided in actions at law as a presumptive bar, on the ground of discouraging stale claims, or gross *laches* or unexplained acquiesence in the assertion of an adverse right." *Castner* v. *Walrod*, 83 Ill. 171; Story, Eq. Jur. §§ 64*a*, 1520; 2 Madd. Ch. Pr. 244, 247; Mitf. Eq. Pl. 267-274.

In the first case cited in the preceding paragraph this court says: "The principle that must control a case of this character has been clearly stated by Lord CAMDEN in *Smith* v. *Clay*, 3 Brown, Ch. 639, Amb. 645, in these words 'That a court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands where the party has slept upon his rights for a great length of time. Nothing can call this court into activity but conscience, good faith, and reasonable diligence. Where these are wanting the court is passive, and does nothing. *Laches* and neglect are always discountenanced; and therefore, from the beginning of this jurisdiction, there was always a limitation of

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suit in this court.' The principle announced in the case cited has been so long sanctioned and upheld, both in the courts of England and in this country, and the doctrine that courts of equity will not lend their aid to enforce stale demands so well understood and so well established, that the citation of authorities to sustain the question would seem to be unnecessary." See *Beach* v. *Shaw*, 57 Ill. 25; *Carpenter* v. *Carpenter*, 70 Ill. 457.

In *Lequatte* v. *Drury*, 101 Ill. 77, it was held that after the lapse of 13 years the relief sought should be denied on the ground of *laches*. In *Hoxie* v. *Commissioners*, 119 Ill. 101, 7 N. E. Rep. 333, the court, after citing numerous decisions of other courts, says: "The principle that lies at the foundation of all the cases in this court on this subject is; the party who challenges the title of his adversary to real property, must be diligent in discovering that which will avoid the title, or render it invalid, and diligent in his application for relief. Unreasonable delay, not explained by equitable circumstances, has always been declared evidence of acquiescence, and will bar relief."

Thus it is seen that the uniform current of decisions is that courts of equity will not permit the assertion of stale claims, and especially is this so where there are equitable reasons why a short period of limitation should be adopted. There are here, in our judgment, strong equitable considerations which should bar the relief sought by this bill. As we have seen, within a few months of 20 years elapsed between the time when the right of the complainant Bates to assert his title first arose, and the filing of this bill. He abstained from asserting (and, so far as this record shows, from claiming) any interest in this land until long after he had ceased to be the guardian of his sons, and presumably until after the guardianship matters had been settled and adjusted. It must be evident that, to permit him now to assert title to one-eighth of this land in fee, and a life estate in another one-eighth, would be entirely contradictory to the basis upon which he ad-

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justed his accounts as guardian. During all this time the children had understood that they were the owners in fee, deriving their title under the will mentioned; and not until after they have contracted to convey a good title, and become liable thereon, does he assert, or, so far as shown, claim, the interest he alleges in his bill. It may be that Gillett, as to a portion of the purchase price, (it not having been paid until after notice of this claim) does not stand in the position of an innocent purchaser for value. But it would, we think, be grossly inequitable to now permit assertion of title by the complainant Bates. At least, he does not come into equity with conscience, good faith, and reasonable diligence. His delay is wholly unexplained, and it must be held that his acquiescence for the length of time indicated amounts in equity to a complete bar to the relief sought by complainants' bill.

The decree of the circuit court is affirmed.

Decree affirmed.

JOHNES *vs.* BEERS.

(57 Connecticut, 295.)

WILLS—CONSTRUCTION.

A testator left part of his estate in trust for the use of his wife for life, and after her death, or, if she died before him, upon his decease, directed it to be converted into money, and divided equally among his four children. In case of the death of any of his children, his or her share should be paid to his or her issue, or, if there were no issue, then to the surviving children equally among them, or their issue, if deceased. Held, that the devises vested in right in the children of the testator at his death, subject to the life-estate of his widow.

Testator left the residue of his estate in trust for his four children, to be converted into money, and divided equally among them, and, on the death of either or any of them, "before he or she shall have received his or her share" such share to go to his or her issue, or,

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if there was no issue, then to the surviving children, or their issue, if deceased. Three years after the death of the testator one of the children died, and devised all his estate to his widow. *Held*, that the widow took the whole of his share of the estate in exclusion of his issue, as the words "shall have received" are to be taken as meaning "shall have become entitled to receive by surviving me," and the devisee "receives" the moment the testator dies, although the enjoyment may be postponed to a future time.

CASE reserved from Superior Court, Fairfield County. Suit by Goldsmith D. Johnes, as executor and trustee of the will and estate of Henry J. Beers, deceased, against Julia A. Beers, Henry J. Beers, and others, for the construction of the will of said Henry J. Beers. The allegations of the complaint having been found true by the court below, the case was reserved for advice.

J. H. Perry, for Henry J. Beers, son and sole issue of Willian A. Beers, deceased. *G. Stoddard*, for Julia A. Beers, widow of William A. Beers, and sole legatee under his will.

PARDEE, J. Henry J. Beers executed his will in 1882, and died in 1884; his wife, one son, William A. Beers, and three daughters surviving. After giving to his wife the use of certain lands for life, the will proceeds as follows:

"*Fifth.* I order and direct my executor and trustee hereinafter named to collect and set apart from my estate securities producing interest of the par value of the sum of seventy-five thousand dollars, and to collect and receive and pay the income derived therefrom as fast as the same shall be received to my said wife, so long as she may live. * * *

"*Seventh.* Immediately upon the death of my said wife, or, if she should die before me, then upon my decease, I order and direct my said executor and trustee to turn said aforementioned real and personal property into money, and to divide the same into four equal parts, and pay one part thereof to my son, William A. Beers; one part to my daughter, Mary B. Johnes, wife of Goldsmith D. Johnes; one part to my daughter Addie

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connection with other evidence may be entitled to considerable weight.

If a testator possesses sufficient mental power to take into account all the considerations necessary to the making of a proper will, though he is subject to an insane delusion, yet if it appears that such delusion neither influenced him, nor was calculated to influence him, in making his will, his will must be upheld.

When a person conceives something extravagant to exist, which, however, has no existence, but is the creature of his imagination, and whenever, at the same time, having once so conceived, he is incapable of being permanently reasoned out of such conception, such person, it is safe to say, is subject to an insane delusion.

It is only a conception or delusion which springs up spontaneously in the mind of a person, and is not the result of evidence of any kind, that can be said to furnish evidence that his mind is unsound.

Where a person is induced by false evidence or by false statements to believe a fact to exist, which does not exist, or where, in consequence of his faith in evidence which is true, but which is wholly insufficient to prove the truth of what he believes, he believes a fact to exist which in reality has no existence, his belief may show want of discernment, or that he lacks ordinary power of discrimination, and is, consequently, easily duped, but not that his mind is unsound.

Belief in spiritualism, that is, that there can be communication between the spirits of the dead and the living, is not an insane delusion.

The term "delusion," as applied to insanity, does not mean a mere mistake of fact, or being induced by false evidence to believe that a fact exists which does not exist.

The declarations of a testator are competent to show the condition of his mind, but not to prove undue influence by either persons or spirits.

ON appeal from a decree of the orphans court of Essex county.

Mr. Francis E. Marsh, for the appellants.

Mr. J. Frank Fort, for the respondents.

THE VICE-ORDINARY. The question presented by the appeal in this case is, whether a decree made by the orphans court of Essex county, on the 4th day of June, 1888, admitting to probate a paper purporting to be the last will of William H. Livingston, deceased, is such a decree as the court should, in view of the facts of the case and the law applicable to them, have made. The

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paper in question was executed on the 11th day of January, 1877, in the city of New York, where the testator then resided. It appears to have been executed in strict conformity to the requirements of our statute regulating the execution of wills. After the execution of the paper in question, Mr. Livingston removed to the city of Newark, in this State, where he died on the 4th day of February, 1888. His wife died in August, 1886, and after that date, up to the time of his own death, his family consisted of himself, his daughter Lillian (his only surviving child), and his mother-in-law, Marie C. Williams. His daughter, at the time of her mother's death, was five or six years of age.

The testator, by the paper in question, gives all his property, of every kind and description to his mother-in-law and, at her death, to her son, William P. Williams, in trust for his daughter, to be held until his daughter has attained the age of twenty-five years, when, in the language of the will,

"Said property shall be handed over intact to her, provided, however, that in consideration of taking care of Lillian till twenty-five years of age, or until her marriage, said Marie C. Williams shall be supported and maintained, in her ordinary manner of living, out of the income derived from said property; and should Marie C. Williams be living when Lillian shall arrive at twenty-five years of age, then Lillian shall give unto Marie C. Williams a satisfactory bond or guarantee for securing to Marie means for her support during the balance of her life. Should my daughter Lillian die before Marie C. Williams then my property shall belong to the latter. And should both Lillian and Marie die before William P. Williams, then my property shall belong to the last named William P. Williams."

Mrs. Williams and William P. Williams are appointed executors. It is not shown who drew this paper, nor where, nor under what circumstances it was drawn. One of the subscribing witnesses says that he thinks the testator wrote it himself. That is the only information we have respecting its preparation or origin.

The validity of this paper as the will of William H. Livingston is contested on two grounds: First, it is

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said, that it is shown to be the product of an insane mind; and, second, that it is shown to be the result of the exercise of undue influence. And it is claimed that the contents of the paper itself furnish strong evidence of the truth of both of these objections. A will may be contrary to the principles of justice and humanity, its provisions may be shockingly unnatural and extremely unjust, nevertheless, if it appears to have been made by a person of sufficient age to be competent to make a will, and also to be the free and unconstrained product of a sound mind, the courts are bound to uphold it. The courts must so treat papers of this kind, in order to maintain that great principle, which confers upon every citizen of full age and sound mind the right to do with his own as he pleases, so long as he does not attempt to apply his property to an immoral or unlawful purpose. But in cases where want of testamentary capacity or undue influence is alleged, it is the duty of the court to scan the provisions of the will to see whether or not they furnish any evidence of the truth of the charges made against its validity.

The feature of the paper under consideration, which is most likely to attract attention, as tending to show that the disposition which the testator made of his property is both unnatural and unjust, is the fact that he has, either inconsiderately or designedly, manifested an unnatural preference for his mother-in-law and brother-in-law over the issue of his daughter. On scanning the will, it will be observed that it contains no indication whatever that the testator intended, in case his daughter should have issue, but did not survive her grandmother and her uncle, that her issue should take his property; on the contrary, if the will be read according to its plain words, it would seem to be entirely clear, that he intended, if his daughter died in the lifetime of either her grandmother or her uncle, that his property should go, even if his daughter left issue, not to her issue, but first to her grandmother, if she was then living, but if not living, then to her uncle. Such I understand to be the plain direction of the will. It says:

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"Should my daughter Lillian die before Marie C. Williams then my property shall belong to the latter. And should both Lillian and Marie die before William P. Williams, then my property shall belong to the last named William P. Williams."

Death is here spoken of generally and without restriction as to time. The testator does not say, if my daughter Lillian shall die, without leaving lawful issue surviving her, before attaining twenty-five years of age, then my property shall go either to her grandmother or her uncle, but what he says is if Lillian shall die before her grandmother or before her uncle, then his property shall go to her grandmother, if living, but if not, then to her uncle. Lillian's issue is not mentioned, nor is any provision made for it, either expressly or constructively, though the possibility that she might have issue before attaining twenty-five is a thing, which, it would seem, must have been before the testator's mind, for, in making provision for her care, he limits the period that her grandmother shall take care of her to the time when she attains twenty-five, or until her marriage. But, suppose we say, that, according to the settled rule of construction in such cases, the true meaning of the will is, that neither the grandmother nor the uncle will take unless Lillian shall die before attaining twenty-five years of age—and that, I think, is the construction which should be adopted—still, it is apparent, that, under this view, the will is not such an one as a father, having an only child, and in the full possession of his senses, and with the instincts and affections common to our nature, would, when entirely free from any sinister influence, have been likely to make. For, under this view, it will be seen, that if Lillian marries, has issue and dies before attaining twenty-five her grandmother or her uncle will take the property given by the will, to the exclusion of her issue. The will, in this respect, is, in my judgment, both unnatural and unjust. But this, standing alone, constitutes no reason why the paper should not be given effect as the will of the testator. It may help to show that the testator lacked testamentary capacity, or that his will is not the free ex-

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pression of his mind and heart, but in a case where it appears that he had the requisite capacity, and that his will is the unfettered expression of his wishes, it amounts to nothing at all.

The paper in question is, however, assailed on other grounds. It is charged that it is the direct product of an insane delusion. The testator was a believer in spiritualism, that is, he believed the spirits of the dead can communicate with the living, through the agency of persons called mediums, and who possess qualities or gifts not possessed by mankind in general. The proofs show that the testator stated to several persons, prior to the execution of his will, that the spirit of his dead wife had requested him, through a medium residing in Forty-sixth street, in the city of New York, to make provision for his mother-in-law in his will. To one person he said, that his wife's spirit had requested him to give all his property to her mother, and to do it in such a way that none of his relatives could get it away from her. To the same person he said, at another time, that the spirit of his wife was constantly urging him to make a will in favor of her mother. To another person he said that the spirit of his wife had requested him to be good to her mother, and see that she was made comfortable during the remainder of her life, and he also said that he intended to make a will, leaving enough to his mother-in-law to make her comfortable, because his wife wanted him to do so. The testator's wife, by her will, gave all her property to the testator, subject, however, to an annual payment of $500 to her mother, and the like sum to her brother, William P. Williams, during their joint lives, and, after the death of either, then to the payment of $1,000, annually, to the survivor during his or her life. The evidence shows, I think, beyond doubt, that the testator believed, fully and thoroughly, that the messages which were delivered to him, as communications from his wife, actually came from her spirit, and that her spirit knew constantly all that he was doing.

The important question which this branch of the case

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presents for decision is, was such belief an insane delusion? The prevailing doctrine in England up to the time the court of Queen's bench decided *Banks* v. *Goodfellow*, L. R. (5 Q. B.) 549, was, that any degree of mental unsoundness, however slight, and even if it exercised no influence of the testator in making his will, and was wholly unconnected with the disposition he had made of his property, would, nevertheless, be fatal to the validity of his will. The course of reasoning which led to the adoption of this doctrine is stated as follows by COCKBURN, C. J., in *Banks* v. *Goodfellow* (*p.* 559): "To constitute testamentary capacity, soundness of mind is indispensably necessary. But the mind, though it has various faculties, is one and indivisible. If it is disordered in any one of these faculties, if it labors under any delusion arising from such disorder, though its other faculties and functions may remain undisturbed, it cannot be said to be sound. Such a mind is unsound, and testamentary incapacity is the necessary consequence."

A different doctrine was established by *Banks* v. *Goodfellow*. It was there held, that if a testator possesses sufficient mental power to take into account all the considerations necessary to the proper making of a will, though he is subject to some delusion, yet if it appears that such delusion did not influence him, and was not calculated to influence him, in making his will, his will is entitled to be regarded as a valid testamentary act, and should be upheld. The principle established by that case is expressed in the following sentence of Chief Justice COCKBURN'S opinion (*p.* 566): "If it be conceded, as we think it must be, that the only legitimate or rational ground for denying testamentary capacity to persons of unsound mind is the inability to take into account and give due effect to the considerations which ought to be present to the mind of a testator in making his will, and to influence his decision as to the disposal of his property, it follows that a degree or form of unsoundness which neither disturbs the exercise of the faculties necessary for such an act, nor is capable of influenc-

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ing the result, ought not to take away the power of making a will, or place a person so circumstanced in a less advantageous position than others with regard to this right." All subsequent cases arising in England have been decided according to this principle, and it is now the established law of that country. *Boughton* v. *Knight*, L. R. (3 Pro. & Div.) 64; *Jenkins* v. *Morris*, L. R. (14 Ch. Div.) 674; *Smee* v. *Smee*, (L. R. 5 Pro. Div.) 84. The same principle has, in its substance, been recognized by the court of errors and appeals of this State. Chief Justice BEASLEY, in pronouncing the judgment of that court in *Lozear* v. *Shields*, 8 C. E. Gr. 509, 511, declared that partial insanity was insufficient, of itself, to justify a decree setting aside a sale of real property, or any other act. He said: "Mania does not, *per se*, vitiate any transaction, for the question is whether such transaction has been affected by it. Where a pure defense of mental incapacity is interposed, I think the true test in this class of cases, is, whether the party had the ability to comprehend, in a reasonable manner, the nature of the affair in which he participated. This is the rule in the absence of fraud, for fraud, when present, introduces other principles of decision." My own view as to the true rule on this subject may be stated as follows: Even if it appears that a testator was subject to an insane delusion when he made his will, but it is also made to appear that his delusion was not of a character likely to influence him, and did not influence him, in the disposition which he made of his property, his will should be declared valid.

But this is somewhat aside from the question mainly in contest on this branch of the case, namely, is a belief in spiritualism an insane delusion? Sir JOHN NICHOLL, in the celebrated case of *Dew* v. *Clark*, 3 Addams, 79, (2 Eng. Ecc. 441), defined insane delusion as follows: "Wherever the patient once conceives something extravagant to exist, which has still no existence but in his own heated imagination, and wherever, at the same time, having once so conceived, he is incapable of being, or at least of being permanently reasoned out of that

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conception, such a patient is said to be under a delusion in a peculiar, half-technical sense of the term, and the absence or presence of delusion, so understood, forms, in my judgment, the true and only test or criterion of present or absent insanity." Dr. Haggard's report of the opinion pronounced in *Dew* v. *Clark*, attributes somewhat different language to Sir JOHN NICHOLL. The following is the definition as he reports it: "When persons believe things to exist which exist only, or at least in that degree exist only, in their own imagination, and of the non-existence of which neither argument nor proof can convince them, they are of unsound mind; or, as one of the counsel accurately expressed it, 'It is only the belief of facts which no rational person would have believed that is insane delusion.'" 1 Wms. Ex'rs, 35; 1 Redf. Wills, 71. Sir JAMES HANNEN, in *Boughton* v. *Knight*, L. R. (3 Pro. & Div.) 64, 68, adopted the definition as reported in 3 Addams as the true one. He said he believed it would solve most, if not all, the difficulties which could arise in investigations of the kind now under consideration. Chief Judge DENIO, in *Seaman's Friend Society* v. *Hopper*, 33 N. Y. 619, 624, said: "If a person persistently believes supposed facts which have no real existence except in his perverted imagination, and against all evidence and probability, and conducts himself, however logically, upon the assumption of their existence, he is, so far as they are concerned, under a morbid delusion; and delusion in that sense, is insanity." And COCKBURN, C. J., in *Banks* v. *Goodfellow*, L. R. (5 Q. B.) 549, 560, says,: "When delusions exist which have no foundation in reality, and spring only from a diseased and morbid condition of the mind, to that extent the mind must necessarily be taken to be unsound."

According to these definitions it is only a delusion or conception which springs up spontaneously in the mind of a testator, and is not the result of extrinsic evidence of any kind, that can be regarded as furnishing evidence that his mind is diseased or unsound; in other words, that he is subject to an insane delusion. If,

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without evidence of any kind, he imagines or conceives something to exist which does not in fact exist, and which no rational person would, in the absence of evidence, believe to exist, then it is manifest that the only way in which his irrational belief can be accounted for, is that it is the product of mental disorder. Delusions of this kind can be accounted for upon no reasonable theory except that they are the creations of some derangement of the mind in which they originate. To illustrate: In *Smee* v. *Smee*, L. R. (5 Pro. Div.) 84, the testator imagined himself to be the son of George IV., and that when he was born a large sum of money had been put in his father's hands for him, but which his father, in fraud of his rights, had distributed to his brothers; and in *Smith* v. *Tebbitt*, L. R. (1 Pro. & Div.) 398, the testatrix imagined herself to be one of the persons of the Trinity, and her chief legatee to be another. The delusion in both instances, as will be noticed, was indisputably a wild and baseless fancy, not the product of evidence of any kind, but obviously the offspring of a disordered condition of mind. But where a testator is induced, by false evidence or false statements, to believe a fact to exist which does not exist, or where, in consequence of his faith in evidence which is true, but which is wholly insufficient to prove the truth of what he believes, he believes a fact to exist which in reality has no existence; his belief may show want of discernment, that he is over-credulous and easily duped, or that he lacks power to analyze and weigh evidence, or to discriminate between what is true and what is false, but it furnishes no evidence whatever that his mind is diseased. His belief may show lack of judgment or want of reasoning power, but not that his mind is unsound.

The testator's belief in spiritualism was not a morbid fancy, rising spontaneously in his mind, but a conviction produced by evidence. The proofs show that, when he first commenced attending what are called seances, he was inclined to be skeptical; afterwards his mind seemed to be in an unstable condition—he sometimes

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believed and at others doubted—and that it was not until the spirits gave an extraordinary exhibition of their power by printing or painting on a pin, worn by his mother-in-law on her neck, in brilliant letters, which sparkled like diamonds, the word "Dickie," a pet name of his dead wife, that his last doubts as to the reality of the manifestations were removed. Believing, as I do, that these manifestations were correctly described by Vice Chancellor GIFFARD, in *Lyon* v. *Home*, L. R. (6 Eq.) 655, 682, when he called them "mischievous nonsense, well calculated, on the one hand, to delude the vain, the weak, the foolish and the superstitious; and on the other, to assist the projects of the needy and of the adventurer," still, it seems to me to be entirely clear, that it cannot be said that a person who does believe in their reality, is, because of such belief, of unsound mind, or subject to an insane delusion. No court has as yet so held. No cases on this subject were cited on the argument. Those which I have examined uniformly hold that a belief in spiritualism is not insanity. The court, in *Robinson* v. *Adams*, 62 Me. 369, said: "Belief in spiritualism is not insanity, nor an insane delusion. * * * The term 'delusion,' as applied to insanity, is not a mere mistake of fact, or the being misled by false testimony or statements to believe that a fact exists which does not exist." And in *Brown* v. *Ward*, 53 Md. 376, 393, it was said: "The court cannot say, as a matter of law, that a person is insane because he holds the belief that he can communicate with spirits [of the dead], and can be and is advised and directed by them in his business transactions and the disposition of his property." Substantially the same view was expressed in *Otto* v. *Doty*, 61 Iowa, 23, and also in the *Matter of Smith's Will*, 52 Wis. 543. The utmost length to which any court has as yet gone on this subject, is to declare that a belief in spiritualism may justify the setting aside of a will, when it is shown that the testator, through fear, dread or reverence of the spirit with which he believed himself to be in communication, allowed his will and judgment to be overpowered, and, in

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disposing of his property, followed implicitly the directions which he believed the spirit gave him, but, in such case, the will is set aside, not on the ground of insanity, but of undue influence. *Thompson* v. *Hawks*, 14 Fed. Rep. 902.

There is no evidence in this case which will support a conclusion that the testator, at the time he executed his will, was subject to an insane delusion.

Nor do I think there is any evidence in the case which will support a judgment declaring that the will in question is the result of undue influence. There is no proof tending to show what influence the spirits or the medium exercised over the testator in making his will, except that which proceeded from the testator's own mouth. His declarations are competent to show the condition of his mind, but not to prove undue influence against either persons or spirits. *Rusling* v. *Rusling*, 9 Stew. Eq. 603, 607. For the purpose of proving undue influence, they are without the least force. Neither the medium nor Mrs. Williams (the mother-in-law), nor any other person who was present at any of the seances, has been examined as a witness. No legal evidence of what occurred at any of them is before the court. The charge of undue influence is mainly directed against Mrs. Williams. She is said to be a believer in spiritualism, and the proofs show that she went with the testator frequently when he went to the medium to consult the spirit of his dead wife. There are some things in her conduct which are calculated to create strong suspicion. Without apparent cause she seems to have entertained feelings of strong dislike towards all the testator's relatives. On the day of his wife's funeral she ordered his sister out of the house, without cause or right, and in utter defiance of the proprieties of the occasion, and after his sister refused to go, she put herself so near to the testator and his sister as to be able to overhear everything they said. From that time forward, up to the time of testator's death, Mrs. Williams continued to reside with him, and his sister never, after the funeral, went to his house, nor,

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so far as appears, did any of his other relatives. When the testator died Mrs. Williams not only neglected to send notice of his death to any of his relatives, but did what she could to conceal his death from them. After the testator's death she admitted that she had persuaded or gotten him to insert the clause in his will, which defers the turning over of his property to his daughter until she is twenty-five, stating that the reason she did so, was because she thought that when the daughter was of age some old fool might come after her for her money, and she wanted to protect her against such persons. And it also appears that she was present when the spirits gave the testator such evidence of their presence as he regarded conclusive, by printing on a pin on her neck, in brilliant letters, the pet name of his wife. These things naturally breed suspicions and create fears. They show that it is possible that every message the testator received, purporting to come from the spirit of his dead wife, came not from the dead, but from the living, and that everything that was done to dispel the testator's doubts and to induce him to believe in the reality of the spiritual manifestations which he witnessed was, from beginning to end, a prearranged scheme of deception and fraud. But there is no proof in the case which will support a judgment that such was the fact. There is enough to raise a strong suspicion, but not enough to produce conviction. Undue influence, like fraud, cannot, in a case where no relation of trust exists, be presumed, but must be proved. I strongly suspect that the testator was duped; it may also be true that he was unduly influenced. I believe that the examination of Mrs. Williams, or the medium, as a witness, would, in all probability, have made many things, which now seem dark and obscure, plain and clear. The question, however, whether or not the paper in question is the will of the testator, must be decided by the evidence before the court. Taking that as the sole guide to the judgment to be pronounced, I think it is the duty of the court to affirm the decree made below.

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Insane delusions—Delusions—Belief in spiritualism—Witchcraft.—Mere belief in modern spiritualism, so called, is not evidence of mental unsoundness, La Bau v. Vanderbilt, 3 Redf. 384; Matter of Keeler, 12 N. Y. State Rep. 148; Continental Ins. Co. v. Delpeuch, 82 Pa. St. 225; see Turner v. Hand, 3 Wall. Jr. 88, 122; Chafin Will Case, 32 Wis. 557.

A belief in witchcraft does not render a testator incompetent, Addington v. Wilson, 5 Ind. 137; Schildnecht v. Rompf (Ky.) 4 S. W. Rep. 235; Kelly v. Miller, 39 Miss. 17; Van Guysling v. Van Kuren, 35 N. Y. 70; Matter of Vedder, 6 Dem. 92; Leech v. Leech, 1 Phila,. 244; Lee v. Lee, 4 McCord 183; see Johnson v. Johnson, 10 Ind. 387; Woodbury v. Obear, 7 Gray 467.

As to the effect of peculiar opinions in regard to a future state of existence, see Austen v. Graham, 1 Spinks 357, 8 Moore P. C. 493; Weir's Will, 9 Dana, 434; Bonard's Will, 16 Abb. Pr. (N. S.) 128; Gass v. Gass, 3 Humph. 278; Denson v. Beasley, 34 Tex. 191.

Contracts or bequests between a believer in spiritualism and a medium upon whom he relies, whereby the medium obtains a benefit, are presumed to have been obtained through the latter's undue influence, Connor v. Stanley, 72 Cal. 566; Storey's Case, 20 Ill. App. 183; Leighton v. Orr, 44 Iowa, 679; Greenwood v. Cline, 7 Oreg. 17; see Norton v. Reilly, 2 Eden 286; Nottridge v. Prince, 2 Giff. 246; and, it seems, the medium may be indicted for money thus obtained, Reg. v. Giles, 10 Cox C. C. 44. See, also, 12 Alb. L. J. 216; 40 Id. 384. (Note by John H. Stewart, Esq., the New Jersey Equity Reporter, appended to the official report of the principal case.)

PHILLIPS *vs.* FERGUSON.

(85 Virginia, 509.)

AMBIGUITY—CONDITIONAL BEQUEST—PAROL EVIDENCE TO EXPLAIN—CONVERSION—LAPSE OF BEQUEST.

A condition annexed to a devise or bequest, avoiding it if the beneficiary marry into the "family" of a person named, in the absence of anything in the context to the contrary, means one of the children of such person.

Such a condition, avoiding all the provisions of the will in favor of any of testator's children who should so marry, is valid, without any limitation of the property over in case of the contingency happening, and defeats devises and bequests of both real and personalty to the daughter who married in violation thereof.

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Parol evidence is admisible to show that a person of the name mentioned lived in the vicinity, and that testator was unfriendly with him, and had shortly before making his will refused his consent to his daughter's marriage with said person's son, who afterwards married her during testator's life without his consent.

Though a provision, that the executors shall expend a given sum in land, to be divided among all his children, ordinarily would be a conversion of the amount into realty, yet the share of the daughter lapsed by her breach of said condition is unconverted, and goes to the residuary legatee.

APPEAL from Circuit Court of City of Petersburg. Bill by William T. Phillips and Ellen C. Phillips, his wife, against Margaret E. Ferguson and George E. Ferguson, as executor and executrix of the will of E. T. Ferguson, deceased, and in their own right, and others, devisees and legatees under said will, for the purpose of obtaining a construction of said will, and an administration of the estate. The suit was begun in the Circuit Court of Greensville county, and removed to that of the city of Petersburg. The decree granted a part of the relief prayed, and plaintiffs appeal.

G. S. & D. M. Bernard, for appellants.

John Lyon, for appellees.

LEWIS, P. J. The testator, after providing in his will for his widow, and making devises to certain of his children, directed in the fourth clause that $5,000 be laid out in land, to be divided between six of his children therein mentioned; and by the residuary clause he directed the balance of his estate, including the property left to the widow (at her death), to be divided between all of his children, of whom there are eight. Then follows the clause out of which this controversy arises, and which is as follows: "If either one of my children above named in my will should marry in T. W. Phillips' family, I only give him or her the sum of three dollars to be their part, and to be all that him or her is to receive under the will; and the foregoing *clause* of this will, that leaves them anything, to be revoked,

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and all other portions of this will that provides for same child." The will is dated January 31, 1884, and the testator died on the 3d of June of the same year. On the 11th of February of the same year Ellen C. Ferguson, one of the "children above named," intermarried with William T. Phillips, an adult son of the said T. W. Phillips, who, at the time, was living with his father, but was of age, and doing business on his own account, and was "in no way dependent upon his father;" and the question was as to the effect, under these circumstances, of the clause of the will last above quoted.

The Circuit Court held that the direction that $5,000 be laid out in land, to be divided as directed, was in effect a devise of realty, and that the said Ellen C. Phillips was not entitled to any estate or interest in the realty devised by the will, but that she was entitled to the legacy of three dollars, and, in addition thereto, to one-eighth of the residue of the personalty bequeathed by the residuary clause, and decreed accordingly; whereupon Phillips and wife, the plaintiffs below, appealed.

1. It is clear, as the Circuit Court held, that, for the purposes of the will, so far as the female appellant is concerned, the money directed by the fourth clause to be laid out in land must be considered, upon the principle of equitable conversion, as real estate. The testator has impressed that character upon it, and *cujus est dare, ejus est disponere*. *Craig* v. *Leslie*, 3 Wheat. 563; *Pratt* v. *Taliaferro*, 3 Leigh, 419; *Effinger* v. *Hall*, 81 Va. 94, and cases cited. Inasmuch, however, as we are also of opinion that she takes nothing under the will (save the legacy of three dollars), the object of the conversion to that extent fails, and consequently the undisposed-of portion of the fund directed to be so invested results, in its unconverted form, as personalty, to the executors for the residuary legatees other than herself. 3 Pom. Eq., § 1172; 1 Lead. Cas. Eq. (4th ed.) 1187, 1202, notes to *Ackroyd* v. *Smithson*, 2 Redf. Wills. 115.

The condition on which the devise was made to the

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children, of which she was apprised by the testator in his lifetime, and before her marriage, has not been observed by her, and its observance was essential to the vesting of any estate under the will. The common law, although it does not allow a condition in restraint of marriage generally and absolutely, when annexed to a gift of lands or of a legacy charged on land, to defeat an estate, yet, if the condition be precedent, a breach of the condition prevents the estate from vesting, no matter how restrictive of marriage it may be. If, however, it be subsequent, then its effect depends on whether it is reasonable or not.

In the present case, the condition in question is not subsequent, so far, at least, as the female appellant is concerned. A condition subsequent is one the effect of which is to enlarge or defeat an estate already created. 1 Lom. Dig. 262. But here, as we have said, without a compliance with the condition, no estate in the land can vest at all; and, as the prohibited marriage occurred before the testator's death, and therefore before any estate in the land has ever vested in the female appellant, or ever can vest in her, under the will of her father, and hence, also, no question of forfeiture arises in the case, as to which much was said in the argument at the bar by counsel for appellants.

2. With regard to the personal property bequeathed by the residuary clause of the will, somewhat different principles, derived in part from the civil law, apply. As to this, it is contended that the interest of the female appellant is absolute, because, as her interest is not given over to some one else, the condition in question is only *in terrorem.*

This position would be well taken if the condition were subsequent; for the settled doctrine is that where a personal legacy is given on a condition in restraint of marriage, and the condition is not precedent, but subsequent, and is afterwards broken, and there is no disposition over, then the condition is construed as *in terrorem* merely, and a mere gift of a residue is not considered a bequest over. There must be a distinct pro-

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vision that the legacy shall vest in a third person, or sink into the residue, on the breach of the condition; otherwise the legacy becomes pure and absolute. If however, the condition be precedent, and not unreasonably restrictive of marriage, the legacy takes effect only upon the condition being observed. 1 Story Eq., § 290.

The system, as will thus be seen, is somewhat incongruous; being, as it is, the result of a blending of the doctrine of the civil law, that marriage ought to be free, with the principles of common law already adverted to.

The law upon this whole subject is well summarized in a valuable treatise, as follows: "If a condition [in restraint of marriage] is precedent, and annexed to a gift of land [or of any interest arising out of land], it operates as at the common law. When broken, it prevents the estate from vesting, whatever be its nature. When annexed to a gift of personal property, if general or unreasonable, it is wholly void, and the gift takes effect; if partial and reasonable, it is operative. When a condition is subsequent, and annexed to a gift of land [or of any interest arising out of the land], if general, it is void, and, although broken, the estate of the donee continues; if partial and reasonable, it is operative, and on its breach the estate of the donee is defeated. When a subsequent condition is annexed to a gift of personal property, if general, it is void; if partial and reasonable, and there is a gift over, it is operative, and upon its breach the interest of the first donee ceases, and the gift over takes effect, but, if there is no gift over, then the condition is said to be *in terrorem* merely, and is inoperative." 2 Pom. Eq., § 933. See also, *Maddox* v. *Maddox*, 11 Grat. 804; 2 Lead. Cas. Eq. 144, notes to *Scott* v. *Tyler*, 1 Story Eq. § 289; 2 Lom. Ex'rs 79; 2 Min. Inst. 245, *et seq.*

The question, therefore, arises in the present case, is the condition in question reasonable? The appellants deny that it is, insisting that it is unreasonably restrictive of marriage, and therefore void upon grounds of

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public policy. But no authority has been cited which goes to the extent of holding that such a condition is invalid, and doubtless none can be found. No inflexible rule on the subject is deducible from the cases, many of which are irreconcilable. The law, however, as we have seen, recognizes as valid conditions in restraint of marriage which are just, fair, and reasonable, and what is such a condition must to a great extent be determined upon the circumstances of each particular case. A condition not to marry a Scotchman, or a Papist, or that the widow of the testator shall not marry again, has been held valid; and no reason is perceived why, ordinarily, a prohibition to marry into a particular family is not equally good; certainly when, as is the case here, the word "family" is used in its primary and restricted sense. It is not a technical word, and, being of flexible meaning, it must be construed according to the context of the will. In one sense it means the whole household, including servants, and even boarders and lodgers; in another, it means all the relations who descend from a common ancestor. Its primary meaning, however, is "children," and so it must be construed in all cases, unless the context shows that it was used in a different sense. An authority upon this point is the case of *Pigg* v. *Clarke*, 3 Ch. Div. 672, in which case the Master of the Rolls, in delivering judgment, said: "Every word which has more than one meaning has a primary meaning; and, if it has a primary meaning, you want a context to find another. What, then, is the primary meaning of 'family?' It is 'children.' That is clear upon the authorities which have been cited; and, independently of them, I should have come to the same conclusion." So in *Hill's Ex'r* v. *Bowman*, 7 Leigh, 650, a trust for the purpose of aiding *any of the members of the testator's family* was held sufficiently certain, and sustained accordingly. See, also 2 Jarm. Wills, 90, *et seq.*

3. It is also clear that parol evidence was admissible in the present case to show who the individual was to whom the testator referred as T. W. Phillips; what family he had, and the relations existing between

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him and the testator. Such evidence is admissible to enable the judicial expositor of the will, as was said in *Hatcher* v. *Hatcher*, 80 Va. 169, to place himself, figuratively speaking, in the very shoes of the testator, and, in the light of all the surrounding circumstances, to ascertain his meaning. "Thus," says Greenleaf, "if the language of the instrument is applicable to several persons, to several parcels of land, etc., or if in a will, the words 'child,' 'children,' 'family,' etc., are employed, in all these and the like cases parol evidence is admissible of any extrinsic circumstances tending to show what person or persons or what things were intended by the party, or to ascertain his meaning in any other respect; and this, without any infringment of the rule, which only excludes parol evidence of other language, declaring his meaning, than that which is contained in the instrument itself." 1 Greenl. Ev., §§ 288, 289; *Senger* v. *Senger's Ex'r*, 81 Va. 687; *Graydon's Ex'rs* v. *Graydon*, 23 N. J. Eq. 229; *Mann* v. *Mann's Ex'rs*, 1 Johns. Ch. 231; *Colton* v. *Colton*, 127 U. S. 300.

With the aid of such extrinsic circumstances, in construing the will before us, there can be no doubt as to the testator's meaning. It appears that for many years before his death he had been at enmity with the said T. W. Phillips, who lived in his neighborhood, and for this reason imposed in his will the condition above mentioned. The will was executed soon after his consent to the marriage of his daughter, the female appellant, with the said William T. Phillips, had been sought in vain, and all of which she was informed at the time. But, in the language of the record, "she deliberately chose to defy her father's anger, and stick to her lover," and she must now bear the consequences of her choice, nor is the case affected by the fact that when the marriage occurred the male appellant was over the age of 21 years, and independent of his father; that does not at all change the family relations of the parties within the meaning of the will.

It need only be added that the testator evidently intended the condition to take effect from the date of

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the will, and consequently effect must be given to it accordingly. The provision of the will is that, in the event of a prohibited marriage, the will, as to the child or children so offending, shall be deemed *revoked*, except as to the legacy of three dollars; and this language manifests the intention of the testator too plainly to be misunderstood. Technically speaking, a will can be revoked only in the testator's lifetime; but in the present case the term, undoubtedly, was used in a broader sense; that is to say, not only to apply to a prohibited marriage which might take place after the date of the will, in the testator's lifetime, but after his death as well. In other words, the testator, by the language used, evidently intended to make a compliance with the annexed condition not only essential to the vesting of an estate under the will, but to a continuance of any such estate after it had once vested; and this it was competent for him to do by virtue of the statute which enacts that a will shall be construed, with reference to the estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, *unless a contrary intention shall appear by the will.* Code, sec. 2521; *Thorndike* v. *Reynolds*, 22 Gratt. 21.

It follows that the decree, as respects the personalty bequeathed by the residuary clause of the will, is, as, the appellees insist, erroneous. It will therefore be reversed in this particular, and in all other respects affirmed.

Decree affirmed in part and reversed in part.

See, also, The University v. Tucker, 6 Am. Prob. Rep. 597, and the note; Chapman v. Chick, Id. 310; Covert v. Sebern, Id. 559, and the note; Matter of Corrington, Id. 120, and the cross-references.

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RHODES *vs.* RHODES.

(88 Tennessee, 637.)

RELIGIOUS SOCIETY—CHARITABLE BEQUEST—TRUST.

Mill. and V. Code Tenn. §§ 2006, 2007, which provides for the acquisition and holding of land for the purpose of public worship, by religious denominations, whether incorporated or not, do not empower an unincorporated local religious association to take a bequest of personal property. Mill. and V. Code Tenn. § 2008, which provides for the conveyance by the proper church officers of land held for the purpose of public worship does not enlarge the capacity of an unincorporated, local, religious association to take personal property under a will probated before the section was enacted.

A bequest of a $1,000 bond to a designated church, "the interest to be applied to the church annually, or as fast as due," is a direct bequest to the church, and not to the executor, as trustee, to hold the bond, and pay over the interest. The bequest, being to an unincorporated local religious association, and failing to define how the interest should be applied, would be void for indefiniteness, even though the executor had been expressly appointed trustee, and, therefore, it cannot be saved by the appointment of a trustee by a court of equity.

APPEAL from the Chancery Court of Fayette County; HENRY J. LIVINGSTON, Chancellor.

H. C. Moorman, for complainant.

H. B. Folk, for respondents.

BURTON, J. The will of Mrs. Ada Murphy was admitted to probate, December, 1881. The question for decision is as to the validity of two bequests contained in the following clause of her will: "I want a U. S. one thousand dollar bond given to Newcastle Church, in Hardeman County, Tenn.; want it registered in Wm. Murphy's name, and the interest applied to the church annually, or as fast as due. I also want a one thousand dollar U. S. bond given to Mt. Moriah Church, Fayette County, Tenn.; want it registered in my name, and the interest applied to the church as fast as due."

The churches thus designated as donees are unincorporated voluntary religious organizations, and under

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the well-settled rule are not capable of taking such a bequest. *Green* v. *Allen*, 5 Humph. 169; *Reeves* v. *Reeves*, 5 Lea, 644; *Daniel* v. *Fain*, Id. 324; *White* v. *Hale*, 2 Cold. 77.

The testatrix is shown to have owned United States bonds, registered in her name. Wm. Murphy, in whose name she directs that the bond given to Newcastle Church shall be registered, was the deceased husband of the testatrix, and in his lifetime had been a member of that congregation, while she had been a member of Mt. Moriah Church, to whom the other bond is given.

It has been very earnestly argued that while these churches are not strictly corporations, yet they are *quasi* corporations, empowered to take and hold real estate as legal entities, under sections 1508 and 1509 of the Code, and that this capacity to take and hold real estate constitutes them, in a limited or qualified sense, corporations with capacity to be the recipients of a bequest such as that contained in this will. To support this position, counsel rely upon the case of *Heiskell* v. *Chickasaw Lodge*, 87 Tenn. 685; 11 S. W. Rep. 825.

The sections of the Code relied upon as giving capacity to these voluntary religious organizations to take this charitable bequest, read as follows:

"Any religious denomination or society, whether incorporated or not, may take, by deed or otherwise, and hold, not exceeding five acres of land at one place, for purposes of public worship."

"All lands bought or otherwise acquired by any religious denomination or society shall be vested in a board of trustees or other persons designated by the members of such denomination or society for the use and benefit thereof."

By the Act of 1883, c. 37, carried into the Code of Milliken & Vertrees at section 2008, provision is made for the conveyance of land so held by such church officers as may, by the rules of discipline of such churches, be authorized to make such conveyance. This provision, however, being enacted after the probate of Mrs. Murphy's will, cannot enlarge in any way the capacity of these churches to take the bequests now

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in question. The charity must stand or fall as it was found to exist at the date of the death of the testator. *White* v. *Hale*, 2 Cold. 77; *Daniel* v. *Fain*, 5 Lea, 325.

The capacity to take and hold real estate conferred by the sections of the Code quoted, operates to confer upon such a voluntary religious society the corporate right of existing as a legal entity for the purpose of holding and conveying, as defined in the statute; and a devise of land for a church-site, to be conveyed when a church building should be erected thereon, has been sustained as valid. *Reeves* v. *Reeves*, 5 Lea, 644.

But this does not constitute such local church a corporation, save in an extremely qualified sense. The power or capacity has been expressly limited to an authority to take land for the purpose of a church-site. *Ibid.* 644.

Indeed, in the last case cited, this power was so narrowly construed as to prevent such a *quasi* corporation from taking a devise of a house and lot to be used as a church parsonage. This view would seem to be hardly sustainable, inasmuch as a parsonage, in connection with a church, might be well deemed to be within the power to take land "for purpose of religious worship." However this may be, there can be no doubt but that a statute conferring *quasi* corporate capacity, upon such an unincorporated body, to take land for purposes of public worship, cannot, by the most liberal construction, be so extended as to confer power to take personal property. The reason for conferring power to take the one kind of property may operate as strongly in favor of the grant of power to take another sort of property; but such reasons should be addressed to the legislative authority, and not to the judiciary, whose duty is limited to the construction of the law, as enacted by the legislative department of government. That this capacity to take land does not include capacity to take a bequest of personalty was expressly decided, and a bequest of a library to such an unincorporated religious body was held void. *Reeves* v. *Reeves*, 5 Lea, 644.

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The case of *Heiskell* v. *Chickasaw Lodge* is not in conflict with *Reeves* v. *Reeves*. Subordinate Lodges of Odd-Fellows were by the act of 1847 empowered to take both *realty* and *personalty*, not exceeding $10,000 in value. We held that, while this power did not constitute them corporations, it did clothe them with the qualified power of taking property as if a corporation, for any purpose germane to the objects of their existence. *Ibid.* 87 Tenn. 685, 11 S. W. Rep. 825.

It is next insisted that, by construction, the executor is constituted a trustee to take and hold these bonds, and pay over the interest to these churches. The rule is well settled that if the devise be to a trustee, to be managed and controlled by him for a definite and lawful charitable use, the gift will be valid, though there be no person in being capable of suing for the enforcement of the trust. *Dickson* v. *Montgomery*, 1 Swan 366; *Cobb* v. *Denton*, 6 Baxt. 235.

We are of opinion that under no rule of construction can this bequest be held to constitute the executor a trustee to hold these bonds, and collect and pay over the interest to these churches. The bequest is direct to the churches, and not to the executor in trust for them. Owning registered bonds, her purpose was that the bonds given should be held by the church, and the interest only used by them. But it is insisted that a Court of Equity will not suffer a valid trust to fail for the want of a trustee, and that this trust should be saved by an appointment now made. This is not such a definite trust as could be executed by and through the Chancery Court. Such a trust would fail if the executor had been expressly appointed and named as trustee, for the reason that the direction as to the application and use of the income is too vague and indefinite. The executor would discharge his duty when he paid over the interest to the officers or members of this church. No direction is given by which he may see to its application and administration. Whether it should be applied to charity, to the employment of a minister, to the erection or maintenance of the church building, or be distributed among the

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members of the church, would depend upon the will of the church members when received. Having no corporate capacity, there would be no responsibility, and there could be no supervision of the use of the charity by the trustee, or by the Chancery Court. Capacity in the church to take and administer the annual interest upon this bequest, would imply capacity to take and hold and administer the principal itself. When the charity is so indefinite, and the beneficiary is incapable of taking, the bequest must fail, although the fund be given to a trustee. In the Reeves case a similar question arose. By the third clause of the will there construed, certain shares of stock were given by the testator to be held by his wife, "as agent for the Christian Church of the United States of America," with directions that she should pay over the proceeds or income "to an authorized trustee to be appointed by said church, and my direction and request to said trustee as aforesaid is that such funds be used in a manner best to promote the general interest of said church." The church thus made the beneficiary being an unincorporated body, this bequest, though made to a trustee for its use, was held void, because indefinite, and therefore incapable of supervision by the trustee or the Chancery Court. 5 Lea, 650, 651.

In the case of *Dickson* v. *Montgomery*, the devise was to the treasurer of Clark Erskine College, and his successors in office, in trust, one part of the interest for the endowment of the college, and the remainder for certain definite religious uses, under the direction of the "Associate Reformed Synod of the South." These bequests were saved, because both the college and the synod were incorporated bodies. 1 Swan. 348.

In *Cobb* v. *Denton* there was a devise of lands for the benefit of Friendship Church, an unincorporated religious association. This devise was held valid because the executors were expressly required to take and hold the land in trust, to apply the rent in the employment and payment "of a competent minister for said church." The object of the charity being expressly defined, and the executors being constituted trustees

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to hold the property in trust for this specific object, the devise was held to be good.

In the case of *The State v. Smith*, where the will of Bolton was construed, a devise to the County Judge of Shelby County, in trust, the interest to be applied to the education of the poor white children of the first district of that county, was sustained, because the education of the poor children of a particular district was a definite, charitable object, and, as such, capable of being administered by the trustee and supervised by the Chancery Court. 16 Lea, 662.

A bequest to an unincorporated, religious, local association, without defining how such bequest is to be applied, would not be saved, even if to a trustee, the income to be paid over to such church. Such a charity is too indefinite and the beneficiary being incapable of suing, the bequest must fail.

Under the well-settled rule, as repeatedly announced by this court, we are reluctantly constrained to affirm the decree of the Chancellor holding these bequests void.

SMITH *vs.* TUIT.

(127 Pennsylvania State, 341.)

EJECTMENT—EVIDENCE.

In ejectment, where defendant claims under the provision of a will of a living person that he shall have immediate possession of the property on condition that he will take testatrix to live with him, and support her as one of his own family, evidence is admissible to show that he took possession under the will, and still retains possession, that testatrix lived with him for a long time, and that defendant performed all his part of the contract; as in that case he could not be deprived of possession, though such contract is contained in a testamentary paper.

ERROR to Court of Common Pleas, Fayette County. Ejectment by Belford J. Tuit against Laura E. Smith, who was in possession of the property claiming under

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the will of Sarah Smith, who was living at the time of the trial. A verdict was directed for plaintiff, and defendant brings error.

Edward Campbell and *Howell & Reppert*, for plaintiff in error.

A. D. Boyd and *Morrow & Hertzog*, for defendant in error.

GREEN, J. By the terms of the paper called the "last will and testament of Sarah Smith, she devises all her estate, real and personal, to Laura E. Smith," and expressly states that she does so for the kindness and care towards her in sickness and in health, "and care during all my natural life." She adds that it is her desire that Smith shall have possession of the house on November 1, 1884, and take her with him, and take care of her as one of his own family. Without anything more, and without possession of the property on the part of Smith, and performance by him of the acts mentioned in the will to be done by him, the paper in question could not be regarded as anything more than a will, revocable at the mere pleasure of the testator. But the offer of parol proof introduces other facts into the case, and, as these were rejected by the court below, they must be regarded as true for the purposes of this case. These facts were that the defendant, the devisee named in the will, took possession of the house and land in dispute under the will, and in pursuance of it, and that he was still there at the time of the trial; that the testatrix, Sarah Smith, moved into the premises with the devisee in pursuance of the intention stated in the will, and there remained for a long time; and that the defendant at all times performed his part of the agreement indicated in the paper.

The offer should have been somewhat more specific, and stated the acts which the defendant did in performance of his part of the agreement, but as it does allege an actual performance it should be regarded as

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made in good faith, and therefore as fairly raising the question for consideration. Viewed in that light, the question is, what effect is produced upon the testamentary paper if the facts offered to be proved are true? It has long been held that such a case is not affected by the statute of frauds, because the terms of the agreement are put in writing, to wit, the will, and this is a sufficient compliance with the requirements of the statute. *Brinker* v. *Brinker*, 7 Pa. St. 53. The circumstance that it is not to take effect finally until after the testator's death will not prevent a specific performance during the life of the testator, if he has put the other party to the agreement in possession of the land. This was held in *McCue* v. *Johnston*, 25 Pa. St. 306, where the decree was only refused because there was no provision for possession during the life of the devisor in either the will or written contract, and no sufficient proof of a verbal contract for such possession. But in *Johnston* v. *McCue*, 34 Pa. St. 180, the same will and agreement were enforced in favor of the first devisee against devisees by a subsequent will, on the ground that the first will and agreement must be treated as an executed contract which the devisor was not at liberty to disregard. It is true, in that case the stipulation of the devisee was expressed in a written paper, but the decision of the question as to how the will was to be regarded was not put upon that ground; and in *Brinker* v. *Brinker* the devisee's part of the contract was in parol, but he was nevertheless held entitled to treat the will was a contract, and not as a will, and to have specific performance. It is true that this was before our statute of frauds was passed, but the will was held to be a sufficient writing to take the case out of the statute in any event. In *McCue* v. *Johnston*, *supra*, the court said: "In point of fact, so far as the instrument by which the conveyance is to take place is involved, it is an executed contract on condition, to take effect at the time specified. A devise transfers the legal estate, and not an equity to be perfected by another instrument. It is the same as if a deed had been exe-

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cuted to take effect *in futuro* only that the common law incident of a feoffment forbids the freehold remaining in abeyance, and a resort must therefore be had to a devise or a conveyance under the statute of uses."

It is clear, therefore, upon all the authorities, that the testamentary character of the testator's agreement is not a bar to relief as upon an executed contract. The difficulty in regard to possession by the devisee during the lifetime of the devisor is removed in the present case by the fact that the will itself provides for a present possession to begin the day after the will was executed. Now, the offer of proof was that such possession was actually taken by the devisee, and that he literally complied with the terms of the will by taking the devisor in with him, and keeping her there a long time, and that he performed all of his part of the contract, and is still in possession. The only practical question then is, can he be deprived of his possession because the contract is contained in a testamentary paper? Certainly not, if for no other reason, because depriving him of his possession would disable him from the further performance of his contract, for which purpose his possession is indispensable according to the terms of the will itself.

We think, therefore, the learned court below was in error in rejecting the offer of proof by the defendant.

Judgment reversed, and new *venire* awarded.

See also, Tuit v. Smith, *infra*, 496.

FORNEY *vs.* REMEY.

(77 Iowa, 549.)

TRUSTS—CONSTRUCTION.

An instrument by which certain personalty is transferred to one in trust, to pay the income and profits arising from it to the grantor during her life, and directing that money coming into the hands of

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the grantee by virtue of the trust shall be invested in real estate designated by the grantor, and that after her death the grantee shall distribute among her children all of said property, does not constitute a gift *inter vivos*, nor is it a testamentary disposition, but is a deed of trust operating *in præsenti*.

APPEAL from District Court, Des Moines County; CHAS. M. PHELPS, Judge. Action of replevin to recover the possession of certain promissory notes. Plaintiff shows in his petition that he is entitled to the possession of the notes as the administrator of J. Ellouisa Forney, deceased, and sets up the grounds upon which defendant bases his claim to the possession of the property. A demurrer to plaintiff's petition was overruled, and, defendant refusing to further plead, judgment was rendered against him, and he appeals to this court.

Power & Huston, for appellant.

P. Henry Smythe & Son, for appellee.

BECK, J. 1. The petition alleges that the notes in controversy were the property of plaintiff's intestate, and that defendant claims to hold them under a conveyance which is in the following language: "For and in consideration of the sum of one ($1) dollar, and the further consideration of the performance and execution of the trust hereinafter referred to by the grantee and assignee hereinafter named, I, Jane E. Forney of Burlington, Des Moines county, and state of Iowa, hereby sell, assign, transfer, and convey unto John T. Remey, of the same city, county and state, certain notes, accounts, and personal property, a full, correct schedule of which is attached hereto, and made a part hereof, marked 'Exhibit A.' Said assignment and transfer, however, is in trust for the following purposes, viz.: Said John T. Remey shall hold said property, and, after deducting from the interest, rents, income, and profit thereof any expenses attending the execution of this trust, shall at least semi-annually pay to me all the interest, rent, income, and

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profit arising from the property hereby assigned, such payments to be made for and during my natural life. It is further agreed and understood that said trustee shall use any money which may come into his hands by virtue of this trust for the purchase of any real estate designated by me; and, if real estate is so purchased, the title to the same shall be taken in the name of said trustee, to be held by him upon the same terms and conditions as the above-mentioned personal property, and at my death all of said property, of whatever kind and character, shall be distributed among the parties hereinafter named as hereinafter provided; and, for the purpose of making such distribution, said trustee is authorized to sell any real estate so acquired by him upon such terms as in his judgment may be for the best interest of the beneficiaries under this trust, and to execute good and sufficient conveyances therefor, and shall loan, upon good and sufficient security, any money coming into his hands by reason of this trust. As soon after my decease as can be done without prejudice to the trust fund, said trustee shall distribute said money, and the proceeds arising from any real estate which he may have acquired as herein provided, among my children and the heirs of my deceased son, in equal shares, viz.: One-seventh (1-7) of said property, or the proceeds arising from the sale thereof, shall be paid to each of my following-named sons: Samuel Kelley, Isaac Kelley, Alexander Kelley, Joseph Kelley, Otis Kelley, and one-seventh (1-7) shall be paid to my daughter, Mrs. Eliza Wright, and one-seventh (1-7) thereof shall be paid to the children of my deceased son, David Kelley, viz., Lee Kelley, Willis Kelley, and Daniel Kelley."

Plaintiff alleges in the petition that the conveyance is without consideration and void, being of a testamentary character, and not executed as required by law. The defendant demurred to the petition on the ground that the conveyance set out in the petition is a valid and binding instrument. The demurrer was overruled, and, defendant refusing to further plead, judgment was rendered against him.

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2. The determination of this case turns upon the validity and sufficiency of the conveyance of the property in controversy by plaintiff's intestate. Plaintiff insists that it is invalid because it is a testamentary instrument, and, not being executed and proved as required by law, is therefore void. It cannot be doubted that one owning property, real or personal, may transfer and convey it to a trustee, to be held for his own benefit or for other beneficiaries. The terms of the trust may be such as are not forbidden by the law. The instrument in question in this case upon its face is a conveyance in trust for the benefit of the grantor and others, who are the beneficiaries named upon its face.

3. But plaintiff's counsel insists that it witnesses a gift *inter vivos*, and as such is not valid, for the reason that it is testamentary in its character. It is plain the conveyance is not a gift *inter vivos*. The grantor herself is named as the first beneficiary, retaining the power to direct the investment of funds arising from the property. The other beneficiaries can, under the instrument, receive no benefits from the property until after the death of the grantor. Nothing further need be said in order to refute utterly plaintiff's position, that the instrument witnesses a gift *inter vivos*.

4. Is the instrument a conveyance, operating *in præsenti*, or is it testamentary in its character, taking effect and operating after the death of the grantor? The language of the instrument itself plainly and forcibly answers this question. It transfers the property to defendant, to be held in trust, as prescribed by the terms of the instrument. The property under the instrument passes to defendant, who takes it as a trustee, and holds it subject to the terms of the trust. The title passes to defendant *in præsenti*. It does not await the death of the grantor. She lost ownership and control of the property by the execution of the deed, while, under the law of trusts, she fixed by the terms of the conveyance its future disposition. There is nothing in the conveyance, or the facts connected with it, suggesting an idea of a

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future power of disposition retained by the grantor. She could not revoke the grant, nor in any way change its terms and conditions. It is not in any sense a testament, nor does it witness a gift *inter vivos*.

5. Counsel on both sides have cited many cases. We think they do not differ as to the rules of the law determining the effect of a testamentary writing, of a valid conveyance in trust, or of an instrument witnessing a gift *inter vivos*. Their contention relates to the character of the instrument before us, whether it be one or another of the characters named. Now the cases cited by counsel for plaintiff fail to support the position that the instrument in question is not a deed of trust, operating *in præsenti*, and is a testamentary writing, or witnesses a gift *inter vivos*. We do not feel called upon to discuss these cases, pointing out where they fail to support counsel's position. Indeed, we think the cases do not at all tend in that direction. It will be readily seen that we cannot expect to find cases which would hold that a deed of trust in the language of the one before us is not a deed, but a testamentary writing. The instrument, in form and effect, is an absolute and direct conveyance of the property in controversy to defendant, in trust for uses specified therein. Surely it cannot be said that the instrument witnesses a gift *inter vivos*, or is testamentary in character, for the reason that the grantor is a beneficiary during her life, and her heirs or children become beneficiaries after her death. This presents the very gist of the case. We cannot be expected to cite and discuss cases upon the A B C principles of the law involved in the simple facts of this case.

The judgment of the district court is reversed.

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ENEBERG *vs.* CARTER.

(98 Missouri, 647.)

CONVERSION—JUDGMENT—LIEN.

Testator, by his will, declared that, after the satisfaction of certain devises and bequests, "I desire the remainder of my estate to be equally divided between my children," naming them. "I desire that my executor will dispose of all my real estate as soon as it can be done without loss to my estate." *Held*, that the will did not operate by its own force to convert the land into money, so as to place it beyond the lien of a judgment recovered against one of the children before the sale by the executor, which lien, by Rev. St. Mo. 1879, §§ 2354, 2730, 2731, 2767, attaches to any interest of the debtor in land, whether legal or equitable.

APPEAL from the circuit court, Jackson county; TURNER A. GILL, J. Action by John F. Eneberg against John L. Carter and others, to set aside certain conveyances. Judgment for plaintiff, and defendants appeal.

Charles W. Freeman and *Karnes & Krauthoff*, for appellants.

James T. Clayton and *Johnston & Lucas*, for respondent.

SHERWOOD, J. The clauses of the will which form the basis of the present contention read this way:

"7. After all the devises and bequests above provided for have been satisfied, I desire the remainder of my estate to be equally divided between my children, Mary D. Carter, Marion Alexander, Annie R. Carter, Elizabeth C. Webb, and John L. Carter.

"9. I hereby appoint Jesse P. Alexander, of Jackson county, executor of my estate. I desire that my executor will dispose of all my real estate as soon as it can be done without loss to my estate."

The testator died in 1875. On the 2nd day of March, 1882, a judgment in favor of the Kansas City Lumber Company was rendered against John L. Carter for

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five hundred and odd dollars, on which judgment execution was issued to the sheriff on the 27th day of February, 1883, and his levy of the execution resulted on the 7th day of April, 1883, in a sale of Carter's right, title, and interest in certain lots in the City of Kansas, plaintiff, being the purchaser, and receiving a sheriff's deed on the date last mentioned, placed the same on record. Carter, on the 5th day of January, 1883, conveyed or attempted to convey, his interest, being an undivided one-fifth in the land in controversy, to said Alexander. The petition charges that this conveyance, as well as other mesne conveyances made and participated in by the defendants, were fraudulently made with a view to evade the collection of the judgment aforesaid; that there was no consideration for any of said conveyances; and asked that, so far as concerns Carter's undivided one-fifth interest in the land, said conveyances be set aside and for naught held. Upon hearing the testimony the court granted the prayer of the petition, and decreed accordingly; hence this appeal.

As seen from the premises, the heart of this cause is involved in the question: Had Carter, the devisee, such an interest in the land that the lien of the judgment could operate thereon? Under our statutory provisions, all interests of a debtor in land, whether legal or equitable, are bound by the lien of a judgment rendered in the same county, and consequently are subject to sale under an execution issuing upon such judgment. Rev. St. 1879, §§ 2354, 2730, 2731, 2767; *Slattery* v. *Jones*, 96 Mo. 216, 8 S. W. Rep. 554. So that it may be safely affirmed that it is a general rule—a rule almost without exception—that the interests of a defendant debtor in land are never beyond the reach of an execution.

Taking this as the predicate for investigation, the inquiry arises: Do the circumstances already detailed exempt the case of the defendant Carter from the operation of the general rule? The claim is made by counsel for the defendants that the clause of the will op-

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erated as an equitable conversion of the land covered by it, and that such conversion was of even date with that of the death of the testator.

1. If this be true, then the rendition of the judgment created no lien; and the plaintiff took nothing by the sheriff's sale and its accompanying incidents. Freem. Ex'ns, (2 Ed.) § 183, and cases cited. Taking it for granted that the words employed by the testator in the ninth clause of his will were of such a nature as to authorize the land to be converted into money, and the money thus raised to be distributed among the five residuary legatees or devisees, (as to which concession see 3 Pom. Eq. Jur. §§ 1159, 1160, and cases cited); and conceding, further, that, if a conversion of the land into money took place, it occurred upon the death of the testator, (Id. § 1162, and cases cited; *Fletcher* v. *Ashburner*, 1 White & T. Lead. Cas. Eq., (4th Amer. Ed.,) 1159, and cases cited;) and conceding that the power conferred by the ninth clause of the will upon Alexander was something more than a mere naked power—was a trust of such a character that it would be recognized and enforced by a court of equity—conceding all these things, I say, the question still recurs: Did the clause of the will in controversy operate by its own force, and without action on the part of the executor, to convert the land into money, and thus place it beyond the lien of the judgment and the execution issued to enforce it? I am not of the opinion it did, and for these reasons: "It is a well-known maxim that an heir at law can only be disinherited by express devise or necessary implication, and that implication is defined to be such a strong probability that an intention to the contrary cannot be supposed." 2 Pow. Dev. 199. And his title cannot be defeated unless there was a disposition of the subject to some other person capable of taking. 2 Fonbl. Eq. 51; *Habergham* v. *Vincent*, 2 Ves. Jr. 224; *Pickering* v. *Lord Stamford*, 3 Ves. 493.

In the present case there was certainly no express devise in fee to the executor, nor are there any such

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words in the will as to raise a fee in him by force of a strong implication. Therefore the fee remained in the heirs at law, both by the devise to them, as well as by the statute of descents, until it should be divested by a sale by the executor under the terms of the will, and until such sale no conversion could occur. *Greenough* v. *Welles*, 10 Cush. 571; Co. Litt. 236*a*; *Warneford* v. *Thompson*, 3 Ves. 513; *Hilton* v. *Kenworthy*, 3 East, 553; *Schauber* v. *Jackson*, 2 Wend. 13; *Lancaster* v. *Thornton*, 2 Burrows, 1028; *Bowman* v. *Matthews*, Forrest, 163; 1 Pow. Dev. 233; *Beadle* v. *Beadle*, 2 McCrary, 586, 40 Fed. Rep. 315; *Compton* v. *McMahan*, 19 Mo. App. 494; *Crittenden* v. *Fairchild*, 41 N. Y. 289; 1 Pom. Eq. Jur. § 371.

I have been able to find no case where the doctrine of equitable conversion has been so applied as to cut out and dominate the title of the heir, except where the donee of the power took a fee by necessary and inevitable implication, or where such fee was in express terms conferred upon such donee; otherwise the title remains vested in the heirs until the donee of the power actually exercises it.

From the foregoing it follows that the judgment lien and execution had something upon which to operate; that plaintiff took a title; that the present proceeding was the proper one in which to assert that title; and therefore judgment affirmed.

All concur, except RAY, C. J., absent, and BARCLAY, J., not sitting.

Devise—Judgment lien.—In Rankin v. Harper, 23 Mo. 579, the court said:—

"Our law subjects all that a man has as property to the payment of his debts, and we know of no reason why the trust that results to him who pays the purchase money * * * * should not be allowed to result to the debtor for the benefit of his creditors so as to afford them the speedy and easy remedy of an execution sale."

"If the creditors obtain judgment against the debtor after the transfer, they acquire liens upon his property wherever the same are given by law, according to the dates of their respective judgments, in the same manner precisely as if no transfer had been made, for the transfer is a nullity as against them, and the legal, as well as the equit-

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able, title remains in the debtor for the purpose of satisfying his debts."

Bump on Fraudulent Conveyances. Third Edition, 474. See, also Jacoby's App., 67 Penn St. 434; Manhattan Co. v. Evertson, 6 Paige, 457; Duncan v. Matney, 29 Mo. 368; Union Bank v. Maynard, 51 Mo. 548; Durrett v. Hulse, 67 Mo. 201.

The great case of Fletcher v. Ashburner, 1 Bro. C. C. 497; S. C. White and Tud. L. C. in Eq. (6th Eng., Ed. 1886) 968, is the leading authority upon the matter of equitable, to the point that, where real estate is ordered to be sold, it becomes personalty and shall go accordingly. In the judgment of Sir Thomas Sewell, N. R., in this case the equitable doctrine of constructive conversion is thus correctly stated:

"That money directed to be employed in the purchase of land, and land directed to be sold and turned into money are to be considered as that species of property into which they are directed to be converted; and this in whatever manner the direction is given—whether by will, by way of contract, marriage articles, settlement or otherwise, and whether the money is actually deposited or only covenanted to be paid; whether the land is actually conveyed or only agreed to be conveyed. The owner of the fund or the contracting parties may make land money or money land."

See, Wheldale v. Partridge, 5 Ves. 396, where this statement of the doctrine is repeated and approved. See, also, 2 Seton on Decrees, (4th Eng. Ed.) 910; Lechmere v. Earl of Carlisle, 3 Peer Wms. 215; Scuddemore v. Scuddemore, Prec. Ch. 543; Buchannan v. Angus, 4 Macqueen's H. L. Cas. 374; Baden v. Earl of Pembrooke, 2 Vern. 58; Whitwick v. Jermyn, cited in the principal case last cited; Pulteney v. Darlington, 7 Bro. P. C. 530; Fulham v. Jones, cited in the case last cited. See, also, the very exhaustive annotation of the case of Fletcher v. Ashburner in 1 White and Tud. L. C. in Eq. (6th Eng. Ed., 1886) pp. 975 to 1026.

CROZIER *vs.* BRAY.

(120 New York, 366.)

CONSTRUCTION OF WILLS—LIFE-ESTATE—REMAINDER.

A testator bequeathed his personal property to his wife forever, and devised to her and his two daughters, in common, all his realty, to be occupied and disposed of by them as they should think proper. By a codicil added eight years afterwards, and expressly declared to be a part of the will, he directed that all that might remain of

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the property of his wife, both real and personal, at her decease, should go to B. His wife died before testator. *Held*, that testator intended to give his wife a life-estate only, with remainder to B. on her death. Affirming 39 Hun, 121.

APPEAL from a judgment of the General Term of the Supreme Court in the fifth judicial department, denying a motion by the plaintiffs for a new trial, and directing judgment for the defendants upon a verdict rendered in their favor at circuit.

This was an action of ejectment, to recover the possession of an undivided interest in about 180 acres of land situate in the county of Ontario. The land formerly belonged to one Luther Whitney, who died, seized thereof, on the 19th of May, 1878, leaving a last will and testament dated February 13, 1864, and a codicil thereto dated March 19, 1872. The following are the material portions of said will: "After paying my funeral charges and lawful debts, I give and bequeath to my beloved wife, Hannah L., all personal property, such as horses, cattle, sheep, swine, poultry, farming tools, grain, hay, books, and household furniture, forever. I give and devise to my wife, and my two daughters, Tasey and Harriet P., in common, all my land or real estate, to occupy and dispose of as they may think proper, provided that my wife and daughter Tasey have a comfortable home in the house, together with all the fuel, fruit and other proceeds of the farm to which they will be entitled as joint owners: provided, further, that, should my daughter Harriet P. die without leaving a child or children, her share of my estate be equally shared by my wife and daughter Tasey. Further, the land is devised as above, subject to the following legacies, which I direct my executors, hereinafter named, to pay at or before the expiration of four years after the death of myself and wife, but without interest: I give and bequeath to my daughter Cornelia one thousand dollars, but, in case of her death without leaving a child or children, I will it to my wife, and two daughters, Tasey and Harriet P., unless Harriet P. should die without leaving a child or children,

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in which case I direct my executors to pay it to my wife and daughter Tasey." The rest of the will provided for the erection of a tombstone, and named the executors. The codicil, aside from a clause nominating a new executor in the place of one who had died, is in these words: "Whereas, I, Luther Whitney, in Seneca, of the county of Ontario and state of New York, have made my last will and testament in writing, bearing date the 13th day of February, A. D. 1864, now, I do by this writing, which I hereby declare to be a codicil to my said will, and to be taken as a part thereof: I therefore will and direct that all that may remain of the property of my wife, Hannah L., both real and personal, at her decease, be made over to and become the property of Cyrus Bray; providing said Cyrus Bray should decease before my wife, then the property that my wife should leave at her decease shall be received by my two daughters, Tasey and Harriet P., and become their property and their heirs." The testator, who was 96 years old at the time of his death, had been married twice. He left as heirs-at-law by his first marriage three children, George, Hannah, and Dolly, and one grandchild, the daughter of Nathan, a deceased son. By his second marriage he left three daughters, Cornelia, Tasey and Harriet. Cyrus Bray married Harriet, and for many years lived with the testator and worked the farm. The second wife, Hannah L., died before the testator, and she never had any property. While five of the heirs-at-law united in bringing this action, only one appealed from the judgment in favor of the defendants.

Charles S. Baker, for appellant.

Edwin Hicks, for respondents.

VANN, J. The appellant claims that the will gave an estate in fee to the wife, Hannah L.; that the devise over to Cyrus Bray by the codicil is void on the ground of repugnancy; and that by the death of Hannah L.

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before her husband the portion devised to her lapsed, and, as there was no residuary clause, descended to the heirs-at-law of the testator. The respondents claim that the will and codicil when construed together, show that it was the intention of the testator that his wife should take a life-estate only, with the remainder over to Cyrus Bray. The position of each is not without the support both of reason and authority, and it is not surprising that the learned judges of the General Term did not unite in pronouncing judgment. While no construction can be given to the will and codicil that will satisfy all fair minds qualified to judge upon the subject, we will endeavor, by a careful analysis of the language used by the testator, to ascertain what he meant to do, and then give effect to his intention to the utmost extent permitted by well-settled rules of law.

By attaching the word "forever" to the gift of the personal property, and by the omission to use that or any word of equivalent meaning to the gift of the realty, the testator may have intended to discriminate between the two gifts, by making the one permanent and the other temporary. The intention to so discriminate is strengthened by the use of the word "occupy" in connection with the devise of the real estate, but it is weakened by the provision that the devisees may "dispose of" the same "as they may think proper." Two provisos follow in direct connection, qualifying or limiting the gift. By the first the testator directs that his wife and daughter Tasey shall have a comfortable home in the house. This operates as a limitation upon the gift to Harriet, so far as the house is concerned, by making it subject to the right of the other two devisees to have a home therein. Such limitation is obviously confined to the lifetime of the wife and Tasey, or to the period during which they would need or could use the house for a home. The remainder of the clause, to wit, "Together with all the fuel, fruit, and other proceeds of the farm to which they will be entitled as joint owners," may be a part of the proviso or a part of the gift. If it is a part of the proviso, it does not ap-

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pear to add to or take from the portion of any devisee, as the word "they" in that case would refer to the wife and Tasey, and the phrase would simply confirm the previous gift to them. If it is a part of the gift itself, the word "they" refers to the three devisees; and, while the effect would be a confirmation of the previous gift in part, by naming the products of the farm, it would also suggest that such gift was intended to be a life estate. The term "joint owners" may refer to the devisees in either capacity, as joint owners of the fee or of an estate for life. By the second proviso the testator directed that, in case Harriet should die without leaving any children, her portion of the estate should be equally shared by the other two devisees. If the reference to Harriet's share is for convenience of description merely, it throws but little light upon the main question; otherwise it would indicate that her share was a fee that he desired to make contingent upon her death without living issue.

The land was devised "as above," subject to the payment of certain legacies "at or before the expiration of four years after the death of" both the testator and his wife, but without interest. He evidently intended by this clause to provide for ease in the payment of the legacies. While the devisees were not directed to pay them, the devise was subject to the payment thereof by the executors, who, for this purpose, were doubtless trustees. As there is nothing in the will indicating an intention to give a life estate to the wife, unless it was also the intention to give a life estate to each of the other devisees, and as the legacies were not payable until after the death of the wife, it follows that, unless the devise was of the fee, her share of the devise was practially freed from any share in the payment of the legacies. Moreover, if the wife had happened to be the last survivor of the three, it is difficult to see how payment of the legacies could have been enforced at all, unless the testator intended to give the land fee. This clause, therefore, tends to support the contention that the devise was absolute.

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The remaining clause of the will has no bearing upon the question presented for decision, except that the gift over to the wife, Tasey and Harriet of the bequest to Cornelia in case of her death without issue surviving, and in the event of Harriet's death, also without issue, to the wife and Tasey, when the legacy was not payable until after the death of the wife, indicates a want of clearness of perception on the part of the testator, and prepares one who studies his will to encounter inconsistencies.

The codicil is expressly made a part of the will, and shows a change of intention with reference to the gift to the wife. As she had no property, the expression, "all that may remain of the property of my wife," evidently refers to that given her by the will. If the reference to it as to property vested in her under the provisions of the will, as in *Van Horne* v. *Campbell* (100 N. Y. 278, 3 N. E. Rep. 316, 771), the attempted gift over of that belonging to another would be void for repugnancy, according to all the authorities. But if it is referred to as the property of the testator, and thus mentioned for convenience of description as in *Norris* v. *Bevea* (13 N. Y. 273, 275), the gift would include that only which belonged to himself, and would indicate one of two results,—either a practical construction of the will as giving to his wife a life estate in the real, and the use during life of the personal, property, or an intent to cut down the previous gift to her by limiting it in this manner. The expression "all that may remain," as applied to the personal property, would thus refer to that which had not been used up, and, as applied to the realty, to that which had not been sold by the wife under the power of sale indicated by the words "dispose of" in the will, and "all that may remain" in the codicil. (*Wager* v. *Wager*, 96 N. Y. 164, 170.) By a proviso, which follows immediately, he refers to the property that his "wife should leave at her decease;" but whether he alludes to it as property that would then belong to his wife, or to that which he had not yet disposed of, is open to the same doubt as the former expression of similar import.

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What did the testator mean by the will and codicil taken together? For the purpose of construction, they should be regarded as one instrument, except that the making of the codicil eight years after the execution of the will emphasizes the change of intention. (*Westcott* v. *Cady*, 5 Johns. Ch. 334; *Willet* v. *Sandford*, 1 Ves. Sr. 186; Schouler, Wills, §§ 468, 487; 2 Jarm. Wills (5th ed.) 840.) We think that he intended to give his wife all that she wanted to use of the personal property, and all that she wanted to use of one-third of the real property, and upon her death the unused remainder of both to Cyrus Bray. His intention, as we gather it from his language, is the same as if he had said: "I give all my personal property to my wife and all of my real estate to her and my daughters Tasey and Harriet, to occupy and dispose of as they think proper, but so much of my wife's part as may be left at her death I give to Cyrus Bray." Clearly, he did not intend to die intestate as to the portion in question, or that any third person should come in between his wife and Mr. Bray, and take any part thereof. He intended to give that part wholly to these two persons, and to no one else. If others are allowed to share in it, it will be contrary to his purpose as expressed in the will. Such being his intention, can effect be given to it? It is not so difficult to ascertain the substance of his desire as it is to discover the method by which he intended to accomplish it. If he intended to give one-third of the real estate to his wife absolutely, and upon her death the whole or a part of the same property to Mr. Bray, he undertook an impossibility, and the attempt must be held abortive, as the latter gift would be contradictory of the former, and void. But a will should not be so read as to contradict itself, if any other reasonable interpretation is possible. If it is capable of two constructions, one consistent and the other inconsistent with the law, the former will be preferred, as it is presumed that the testator intended to comply with the law. If a will and codicil are plainly inconsistent, the latter must control to the extent necessary to give it full effect, as the presumption in such

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a case is much stronger than in the case of a later clause in the same instrument. While a clear gift cannot be cut down by a doubtful expression, still, where a predominant purpose is apparent, but a doubt arises as to the method devised to effect that purpose, such a doubt should be so resolved as to accomplish the object of the testator by presuming that he intended a legal, and not an illegal, method.

Applying these rules of interpretation, which are elementary, to the will and codicil in question, and bearing in mind that intention is the absolute criterion of construction as applied to wills, we are led to the conclusion, although with hesitation and difficulty, that the testator meant, by "all that may remain of the property of my wife," all that might remain of the property that he had provided for her use; that he did not mean to give to Bray property belonging to his wife, but property belonging to himself; and that he either construed the will as giving her a life estate, or intended by the expresion under consideration, in connection with the gift over to Bray, to effect that result. Otherwise the codicil, expressing his afterthought and latest intention, must go for naught, and that which he intended to give to Bray go to those to whom he intended to give nothing. While the language employed is not such as would be chosen by an experienced lawyer either to limit an estate, or to allude to one as already limited, an inaccurate use of words cannot be allowed to defeat the manifest intention to give to Bray what was left upon the wife's death. What could be left for him if all had been given to another? Yet something was intended to be left, either by withdrawing a part that had been given to the wife, or by construing the gift to her as not constituting a fee. If he had said, "Whereas, by my will I gave a life estate to my wife with power to sell, now, by this codicil, I give that which may remain upon her decease to Cyrus Bray," his meaning would have been plain. While in the codicil, as written, he did not expressly characterize the gift to his wife, we think that he did so impliedly, and treated it as a life estate

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by giving away the remainder. Moreover, the expression "all that may remain," by fair implication, indicates that he intended that something should be left which he had not given to his wife, and hence could give to another. By fixing upon the death of his wife as the contingency when the gift to Bray should take effect, he also pointed out the nature of the provision for her, as he understood it. In fine, unless we mock the aged testator by reading his words as meaningless or unlawful, we must conclude that, by the will and codicil together, he intended to give a life estate to his wife with power to sell, and upon her death, the remainder to Mr. Bray.

We regard this conclusion as sustained by the weight of authority, but it must be conceded that the decisions are not uniform. The cases are so numerous, and the language and schemes of the wills considered therein so varied, as to produce confusion. It is believed, however, that they all unite in the effort to give the greatest possible scope to the dying owner's wishes, and that an apparent conflict arises from bending his words in one part of the instrument so that they will fit those used in another part, in order to accomplish this result. When the intent is ascertained, it is almost blindly followed. In *Taggart* v. *Murray* (58 N. Y. 233, 236), the court said: "But in the construction of wills * * * the intention is to be ascertained by the consideration of the whole instrument, and the construction is not to be made upon a single or isolated clause detached from its relation to those with which it is associated. If, on a comparison of the different provisions of a will it is found to contain dispositions which are repugnant to each other, then it is the office of judicial interpretation to preserve, if consistent with the rules of law, the paramount intention of the testator as disclosed by the instrument, although in doing so it may defeat his purpose in some subordinate and less essential particular. It is, however, a primary rule in the construction of wills that effect is to be given, if possible, to all of its provisions, and no clause is to be rejected, and no inter-

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est intended to be given is to be sacrificed, on the ground of repugnancy, when it is possible to reconcile the provisions which are supposed to be in conflict. In accordance with this rule, it held that subsequent clauses in a will are not incompatible with or repugnant to prior clauses in the same instrument, where they may take effect as qualifications of the latter, without defeating the intention of the testator in making the prior gift." Among the authorities cited in support of the language quoted is *Norris* v. *Beyea* (13 N. Y. 280, 284), from which the following extract is taken: "But there is, in truth, no repugnancy in a general bequest or devise to one person in language which would ordinarily convey the whole estate, and a subsequent provision that, upon a contingent event the estate thus given should be diverted, and go over to another person. The latter clause, in such cases, limits and controls the former, and when they are read together it is apparent that the general terms which ordinarily convey the whole property are to be understood in a qualified, and not an absolute sense."

In *Terry* v. *Wiggins* (47 N. Y. 512), the testator, after devising to his wife a piece of real estate "for her sole and absolute use and disposal," devised to her all his other real and personal estate, "for her own personal and independent use and maintenance, with full power to sell or otherwise dispose of the same in part or in whole, if she should require it or deem it expedient to do so;" and, after her decease, "whatever residue there may be of personal or real estate" he gave to a religious society. It was held that, by the second devise to the wife, she took a life estate only, with a conditional power of disposal annexed, which did not operate to enlarge the estate to a fee, and that the limitation over was not repugnant, but valid. The decision rested upon the general scheme of the will, and the language was so construed as to reconcile the different provisions, and give effect to every part of the testator's purpose. In *Wager* v. *Wager* (96 N. Y. 164), the testator, after a bequest to his wife, devised and bequeathed

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to his daughter, Susie, all the remainder of his real and personal estate, but directed that, if Susie should die before his wife, "all the property, both real and personal, that shall be left by my daughter at her death," should go to his wife. The wife survived the testator, and he survived his daughter. It was held that the gift to the wife, in case she survived the daughter, was not dependant upon the taking effect of the primary gift to the daughter; that while the language employed in making the latter gift would generally import an absolute estate, yet, as such a construction would render inoperative the limitation over and would defeat the manifest intent of the testator, it was the duty of the court to so construe as to render the whole will operative, and to effectuate the intent, and that the widow was entitled to the whole estate.

Referring to the claim that the provision for a remainder to the wife was void for repugnancy, the court said: "There are no words of inheritance or express language used in the bequests indicating an intention to give an absolute estate to the daughter, and such an intention is inferrable only from the language used in constituting the remainder for the wife, which, by describing it as that part of the devised property to be left by the daughter at her death, leaves it to be implied that the power of disposing of it during her life was intended to be given to her. * * * The language of the provision under consideration expressly gives the property therein described to the wife solely upon the contingency of the death of the daughter, whenever that might occur, and we think that there is no language used in the will indicating an intention on the part of the testator to make this devise in any way dependent upon the taking effect of the first devise. The entire contention of the plaintiff is based upon an inference sought to be drawn from language used simply by way of description, and the attempt is thus made to destroy an estate, by an inconclusive inference, which the express language of the will attempted to create. * * * The controlling force, which has always been given to

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the intent of the testator, as ascertainable from the general scope and tenor of the instrument, requires us to ascribe * * * inexactitude of expression, rather than such a meaning as will defeat his intent. We are of the opinion that, although the language employed in making the devise to the daughter would generally import an absolute estate in the property, yet that the creation of a limitation over, clearly intended to deny her the power of disposing of it by will, and the force of the testator's intention, as derived from the provision for a remainder in the wife, and the scope and design of its provisions generally, fairly imply an intention on his part to confer a life estate only upon the daughter.

Much more of this opinion might be repeated as applicable to the case under consideration, including the comments upon *Campbell* v. *Beaumont* (91 N. Y. 464). Out of the multitude of authorities that might be cited as applicable, we shall particularly refer to but one more, *Smith* v. *Bell* (6 Pet. 68), in which the opinion of the court was prepared by Chief Justice MARSHALL. In that case, after a specific bequest, the testator gave to his wife all of his "estate, whatsoever and wheresoever, and of what nature, kind, and quality soever, * * * for her own use and benefit and disposal absolutely; the remainder of said estate, after her decease, to be for the use of" his son. The court said: "The first and great rule in the exposition of wills, to which all other rules must bend, is that the intention of the testator expressed in his will shall prevail, provided it be consistent with the rules of law. * * * These words [referring to the gift over to the son] give the remainder of the estate, after his wife's decease, to the son with as much clearness as the preceding words give the whole estate to his wife. They manifest the intention of the testator to make a future provision for his son, as clearly as the first part of the bequest manifests his intention to make an immediate provision for his wife. If the first bequest is to take effect according to the obvious import of the words taken alone, the last is expunged from the will. The operation of the whole clause will be pre-

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cisely the same as if the last member of the sentence were stricken out, yet both clauses are equally the words of the testator, are equally binding, and equally claim the attention of those who may construe the will. * * * The limitation in remainder shows that, in the opinion of the testator, the previous words had given only an estate for life. This was the sense in which he used them. * * * But suppose the testator had added the words 'during her life.' These words would have restrained those which preceded them. * * * If this would be true provided the restraining words 'for her life' had been added, why may not other equivalent words—others which equally manifest the intent to restrain the estate of the wife to her life— be allowed the same operation? The words, 'the remainder of said estate, after her decease, to be for the use of the said Jesse Goodwin,' are, we think, equivalent. They manifest with equal clearness the intent to limit the estate given to her to her life, and ought to have the same effect. They are totally inconsistent with an estate in the wife, which is to endure beyond her life." See, also, *Colt* v. *Heard*, 10 Hun, 189; *Greyston* v. *Clark*, 41 Hun, 125; *Wells* v. *Seeley*, 47 Hun, 109; *Leggett* v. *Firth*, 53 Hun, 152.

The most, if not all of the cases relied upon by the plaintiff, differ from that at bar in one or more of three particulars; (1) There was no specific gift over of the primary devise; (2) the gift over was by a later clause in the same instrument, if not in the same sentence; (3) the intent of the testator was not clear.

We think that the judgment should be affirmed, with costs.

All concur, except BRADLEY and HAIGHT, JJ., not sitting.

Judgment affirmed.

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TUIT *vs* SMITH.

(137 Pennsylvania State, 35.)

CONTRACT TO MAKE A WILL—RIGHT TO RESCIND.

A contract made in a will under which immediate possession of land is to be given to the devisee on condition that he take testatrix to live with him, and support her as one of his own family cannot be rescinded after possession has been given and expenditure made on the faith of it for slight annoyances suffered by testatrix in devisee's family.

APPEAL from Court of Common Pleas, Fayette County; NATHANIEL EWING, Judge.

Edward Campbell, *George D. Howell*, *E. H. Reppert*, and *George B. Jeffries*, for appellant.

Boyd & Umbel and *Morrow & Hertzog*, for appellee.

STERRETT, J. Both parties to this action of ejectment claim under Sarah Smith, who purchased the house and lot in controversy in October, 1884, and in consideration of plaintiff's agreement to support and maintain her during life, etc., conveyed the same to him by deed dated August 29, 1885. The record of that deed, together with plaintiff's agreement and bond of even date therewith, was given in evidence, and relied on by him as evidence of title and right of possession.

The defendant, on the other hand, relied on a prior contract, of a somewhat similar nature, between Mrs. Smith and himself, not in the form of a conveyance or agreement to convey the property in controversy to him, but evidenced by a testamentary paper executed by her in October, 1884, wherein she devised the house and lot to defendant, "for his kindness and care toward me in sickness and in health, in watchfulness and care during all my natural life, and at my decease the aforesaid property shall belong to the said Laura E. Smith, his heirs or assigns, with all rights, liberties, and hereditaments forever. It is my will and desire

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that the said Laura E. Smith have possession of my house on the first day of November, 1884, and he take me with him, and that he take care of me as one of his own family." It was admitted that, in pursuance of what is contained in the paper, and in accordance with the mutual understanding and agreement of both parties, the defendant went into possession, and took Mrs. Smith with him as a member of his family. She selected her rooms in the house. They were comfortably fitted up for her, partly with her own furniture which she had before, and partly with furniture procured by defendant. She remained there as a member of the family until the following September, and then left without assigning any satisfactory cause for so doing.

When this case was here in 1889, it was held, in an opinion by our Brother GREEN, that the testamentary paper above referred to might operate as a memorandum of contract for the sale of land sufficient to comply with the statute of frauds and, as such, it was admissible in evidence during the lifetime of the testator that such a paper, without evidence of anything done under it by the devisee, cannot be treated as anything more than a will, revocable at the pleasure of the testator; but when the testator has put the devisee in possession of the land, and the latter has complied with his part of the agreement, the devise loses its revocability, and must be treated as an executed contract. (*Smith* v. *Tuit*, 127 Pa. St. 341, 17 Atl. Rep. 995.) The defendant on this trial, undertook to prove, and did successfully show, that he was put in possession of the property in controversy by Mrs. Smith, and that he substantially complied with his part of the contract by taking her with him and caring for her "as one of his own family." The plaintiff undertook to rebut the evidence thus introduced by defendant, but, aside from showing some slight annoyances and inconveniences such as are likely to occur in any ordinary family, the case made out by the defendant's evidence was not successfully assailed. Mrs. Sarah Smith, the old lady who conveyed the property to plaintiff, was his main wit-

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ness, and, assuming her testimony to be true, there is nothing in it to justify her in rescinding the contract she made with the defendant, and on the faith of which he expended money in the improvement of the property. The witness was 90 years old, and testified in a rambling and incoherent manner, such as might be expected in one of her advanced years. In answer to the question, "How did the defendant treat you while you were staying with them?" her answer was: "Well, only sometimes he would take a spurt in ugliness; have a bad word, you know. He was just middling. I suppose he done the best he knew how." Again, in answer to the question whether defendant's wife abused her, she said: "Oh, no, not particularly, any more than she wasn't very much of a talker of a woman, nor she didn't quarrel, nor nothing of the kind." Again in answer to the question whether the defendant offered to strike her, her reply was: "Oh, no. If he had, he would have got a black nose."

Without referring at length to the plaintiff's rebutting evidence, it is sufficient to say that there appears to be nothing in any of it that would justify a rescission of the contract in pursuance of which defendant was put in possession of the premises in controversy. In view of the insufficieney of plaintiff's rebutting testimony, the court in defendant's first point for charge, was requested to instruct the jury "that the plaintiff has shown no facts which would justify Sarah Smith in rescinding the contract contained in her will, and therefore he cannot recover." We think this point should have been affirmed. The plaintiff was certainly in no better position than Mrs. Smith would have been if she had brought the action herself, without having conveyed the property. The case may be regarded as a close one, but on a careful review of the evidence, we are of opinion that it should not have been submitted to the jury.

Judgment reversed.

See, also, Smith v. Tult, *supra*, 473.

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STAMM *vs.* BOSTWICK.

(122 New York, 48.)

ALIENS—RIGHT TO INHERIT.

Under Laws N. Y. 1875, c. 38, providing that aliens may inherit from a citizen who has "purchased and taken conveyance" to real estate, an alien may inherit land that the owner acquired by devise, for title by devise is title by "purchase," within the meaning of the statute. Affirming 40 Hun, 35.

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department entered upon an order made March 26, 1886, which affirmed a judgment in favor of plaintiff entered upon a decision of the court without a jury. This action was brought to determine the title to real estate in the city of New York. Eliza Anderson, a native born citizen of the United States, died, in the year 1867, seized and possessed of the property in question, leaving a last will and testament by which she devised the said premises to her niece, Eliza Anderson, for the term of her natural life, remainder in fee to her lawful issue. Eliza Anderson, the niece, was a native citizen, and, at the time of her aunt's death was the wife of the plaintiff. The only issue of the niece was Elizabeth Stamm, who survived her mother. Upon the death of her mother Elizabeth entered into possession of the premises, and continued in the actual possession thereof until her death in September, 1881. She was a native citizen of the United States, and died intestate, unmarried, and without issue, leaving her father, the plaintiff, surviving her. Upon her death, the plaintiff took possession of the premises, and occupied them until the commencement of this action. The plaintiff was born in the Electorate of Hesse, in 1846. He came to the United States in 1860, and has since resided here. He filed his declaration to become a citizen in October, 1881, and was naturalized in 1884. The defendant is a brother of the plaintiff's wife, a native citizen and of full age, and was entitled to said premises as heir at law of said Elizabeth Stamm, un-

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less the plaintiff has the capacity to inherit and hold real estate within the state.

Lewis Johnston, for appellant.

Paul Fuller and *Coudert Bros.*, for respondent.

BROWN, J. The single question involved in this appeal is whether a resident alien who according to the statutes of this state would answer the description of heir of a deceased citizen, can inherit and hold real estate owned and held by such deceased citizen at the time of his death.

By chapter 38, Laws 1875, it is provided as follows: "If any alien resident of this state, or any naturalized or native citizen of the United States, who has purchased and taken, or who hereafter shall purchase and take, a conveyance of real estate within this state, has died, or shall hereafter die, leaving persons who, according to the statutes of this state, would answer the description of heirs of such deceased person * * * such persons so answering the description of heirs * * * of such deceased person, whether they are citizens or aliens, are hereby declared and made capable of taking and holding, and may take and hold as heirs * * * of such deceased person, as if they were citizens of the United States, the land and real estate owned and held by such deceased alien or citizen at the time of his death."

The appellant contends that this statute has no application, inasmuch as Elizabeth Stamm, the decedent, had not purchased and taken a deed of the lands in question, but acquired them as devisee under her mother's will.

The popular and commercial meaning of the words "to purchase" is, doubtless, "to buy," but in general, in law, the words have a more extended meaning, and include every mode of acquiring land except by descent.

"There are two modes, only, regarded as 'classes,' of acquiring a title to land, namely, descent and purchase;

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purchase including every mode of acquisition known to the law, except that by which an heir on the death of an ancestor becomes substituted in his place as owner by the act of the law" (3 Washb. Real Prop. 290; *James* v. *Morey*, 2 Cow. 246; *McCartee* v. *Orphan Asylum Society*, 9 Cow. 437--507; *Hoyt* v. *Van Alstyne*, 15 Barb. 568--572.)

Many cases could be cited where courts have given the restricted meaning to the word, in the contruction of statutes, and to carry out the intent of the legislature, but we are of the opinion that in this case the intention of the legislature is best effectuated by giving to the word its most extensive signification.

The act of 1875 was an amendment of chapter 261, Laws 1874, which amended section 4, c. 115, Laws 1845.

In the principal act, the legislature dealt with the acquisition and disposition of real property by resident aliens.

The act is entitled "An act to enable resident aliens to hold and convey real estate, and for other purposes."

Section one empowered resident aliens to hold real estate, acquired by grant or devise.

Section two gave dower to wives of such aliens.

Section three gave dower to alien wives of citizens.

Section five confirmed grants and devises made by resident aliens; and

Section six empowered such aliens who had acquired or who should thereafter acquire real estate by grant or devise to grant and devise the same to any citizen or resident alien.

These and other sections of the act indicate clearly the scheme of the legislature.

Resident aliens, who made and filed the deposition required by the first section of the act, were made capable of taking and holding real estate, and disposing of it in the manner stated, the same as if they were citizens.

Every mode of acquisition and disposition of land of resident aliens was provided for, except that by descent.

We find that covered by the fourth section of the act.

If, however, the appellant's construction of that section is to prevail, alien heirs would not inherit, unless

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the intestate had acquired some or all of his property by deed. If the intestate's land had come to him by devise the fourth section of the statute would be inoperative. On the other hand, if he had, at some time during his life, acquired some land by deed, then all the land owned at the time of his death—that which he held by devise as well as that held by deed—would pass under section four, and it would be no bar to the operation of the statute that the land acquired by deed was not owned at the time of his death. A purchase by deed of some land, no matter how insignificant the quantity, or how remote from the time of the ancestor's decease, would be in the nature of a condition precedent to inheritance by alien heirs.

There is certainly no public policy which dictates such a reading of the statute, and no reason is apparent why the legislature, intending as it did that aliens should inherit and hold real estate within the state, should have made the inheritance depend upon a purchase by deed by the ancestor, a fact which, in the general operation of the statute, would be of no importance.

The intention of the legislature is clearly expressed that resident aliens may grant and devise all land, that they are made capable of holding by the act in question, and I think it was equally the intention that, if they failed to dispose of it by deed or will, it should, by section 4, pass to those there made capable of taking and holding it. There is no particular signification in the expression "take a conveyance," as the term "conveyance" is as applicable to the will in the case of a devise as it is to a deed in a case of a grant.

These views require that the word "purchase" should be given its broadest meaning, which would include all land acquired by devise.

The act of 1874 added naturalized and native citizens to the class of persons from whom aliens might inherit, and the act of 1875 permits aliens to take as devisees as well as heirs. Our conclusion is that Elizabeth Stamm held the land in question as purchaser, and the plaintiff had the capacity to inherit as her heir.

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As against every person, except the state, he could hold the land without making the deposition required by the first section of the act; and whether or not his title was good against the state is a question with which the defendant has no concern. The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

KUNTZLEMAN'S ESTATE.

(136 Pennsylvania State, 142.)

CONSTRUCTION—NATURE OF ESTATE—RULE IN SHELLEY'S CASE.

A devise of property in trust to pay the income to testator's daughter, "for her sole and separate use, upon her separate receipt, without the control or interference of any husband she may have or take, for and during all the term of her natural life," creates a trust for life, and not for coverture, though the daughter, being only five years old, is not married nor contemplating marriage.

Testator devised property in trust to pay the income to testator's daughter for life, and after her decease "in trust to and for the only proper use, benefit, and behoof of such person or persons as would be entitled to the same" by the laws of the state, "if my said daughter had survived her mother and husband, * * * and died intestate, seized and possessed of the said premises, and for such estate and estates as such person or persons would in such case be entitled to by the laws aforesaid." *Held*, that, because of the exclusion of the husband and mother, the rule in Shelley's Case did not apply, and the devise created a valid trust in favor of those entitled in remainder, and it was immaterial that the husband and mother died before the daughter.

APPEAL from Orphans' Court, Philadelphia County; W. N. ASHMAN, Judge. This was an adjudication of an account filed by the Girard Life Insurance, Annuity

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& Trust Company, substituted trustee in the trust for Amanda C. Kuntzleman (*nee* Dorney), under the will of Phillip Dorney. The *cestui que trust* contended that the trust was executed, and that she was entitled to the *corpus* of the estate. The court below decreed otherwise, and she appealed.

Neilson & Neilson, for appellant.

Geo. Tucker Bispham, for appellee.

CLARK, J. The will of the testator, Philip Dorney, was probated on the 16th of September, 1840. At that time, his daughter, Amanda Cornelia, the appellant, was a child five years of age, of course unmarried, and not contemplating marriage. She was first married to Craig, June 14, 1855. Her husband died in November, 1864. She was afterwards married to Kuntzleman, and survived her second husband also.

The testator's will contained a clause as follows:

"And the remaining one full equal and undivided tenth part thereof unto the said George Miller, his heirs, executors, administrators, and assigns, in trust, nevertheless, to place and continue the personal estate at interest on good landed security or interest, or invest the same in some productive public funds or loans, and to pay the interest and income thereof, and the rents, issues, and profits of the real estate unto my said daughter, Amanda Cornelia Dorney, for her sole and separate use, upon her separate receipt, without the control or interference of any husband she may have or take, for and during all the term of her natural life; and, from immediately after the decease of my said daughter, Amanda Cornelia Dorney, then in trust to and for the only proper use, benefit, and behoof of such person or persons as would be entitled to the same by the laws of the commonwealth of Pennsylvania, if my said daughter had survived her mother and husband, if any she may have, and died intestate, seized and possessed of the said premises, and for such estate, and

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estates, as such person or persons would, in such case be entitled to by the laws aforesaid."

The appellant's contention is that the whole purpose of the trust, created by this clause of the will, was a trust for coverture, or for the separate use of the testator's daughter, which fell for lack of marriage, or a contemplated marriage, to support it; that as her mother and her husband are both dead, the parties to take, at the daughter's death, are her right heirs, and that by the rule in Shelley's Case she has an absolute estate in the fund for distribution. The appellees, on the other hand, contend, first, that the trust is active during the continuance of the life estate of Mrs. Kuntzleman; that her estate, therefore, is an equitable estate, while the estate to the heirs in remainder is legal, and that for that reason the former cannot coalesce with the latter; and, second, that even if the particular estate be held to be a legal estate, the estate in remainder is limited in language which does not bring the gift within the rule.

It is conceded on all hands that for the reasons already stated, the trust cannot be sustained as a separate use or a trust for coverture, and the authorities are full and plain upon this point. *Wells* v. *McCall*, 64 Pa. St. 208; *Ogden's App.*, 70 Pa. 501. Nor, apart from the purpose of the testator with respect to the remainder, can we dicover any other object to be obtained by the trust than a separate use for his daughter. In the case of each of his sons, the income was to be "free from their debts," etc., and although the use of these words, perhaps, was not essential to create a spendthrift trust, their omission in the clause quoted is significant in the ascertainment of his purpose with respect to his daughter. There is nothing in this will to indicate the testator's intention to create a spendthrift trust. On the contrary, it is plain that his purpose was to create a trust for coverture.

Where an actual trust is created to give effect to a well-defined, lawful purpose of a testator, in relation to his family, the trust will be sustained, whether the

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cestui que trust be *sui juris* or not. This was established in *Barnett's App.*, 46 Pa. 392, overruling, in terms, *Kuhn* v. *Newman*, 26 Pa. 227, where a different doctrine had been declared, and the ruling in *Barnett's Appeal* has since been steadily maintained. See *Earp's App.*, 75 Pa. 119, and cases there cited. In these cases, however, the bequests and devises of income were to children for life, irrespective of coverture, and a clear purpose appeared to protect the corpus of the estate for the ultimate devisees.

But the cases cited, and many more in the same line, and to the same effect, are clearly distinguishable from those in which the purpose of the testator is to create a trust for coverture. A trust for coverture is one of the well-settled instances in the doctrine of special trusts. Where the trust falls there is no marriage in fact or in contemplation to support if it, or where, upon the husband's death, coverture ceases; and it is immaterial that the trust imposes active duties upon the trustee. These duties are only subsidiary to the main purpose; they are mere incidents or adjuncts to the trust; and if the trust itself falls, these active duties are dispensed with. They will not uphold the trust; they fall with it. *Megargee* v. *Naglee*, 64 Pa. 216; *Yarnall's App.*, 70 Pa. 336; *Ogden's App.*, Id. 501; *Ashurst's App.*, 77 Pa. 464; *William's App.*, 83 Pa. 377.

But we think the testator's purpose, in part, was by means of this trust to protect the corpus of the estate for the parties entitled in remainder, and we are of opinion that the trust should be upheld in support of the remainder. The bequest of the interest and income is expressly for life, and not during coverture, and is of the income only, not of the corpus of the estate. Those entitled in remainder are "such person or persons as would be entitled to the same by the laws of the commonwealth of Pennsylvania," if the daughter "had survived her mother and husband," and died intestate. The expression, "such person or persons as would be entitled to the same by the laws of the commonwealth of Pennsylvania," may perhaps be taken to

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signify "heirs," *Dodson* v. *Ball*, 60 Pa. 492; *Williams' App.*, 83 Pa. 377; and it may be assumed that the persons entitled under the words of the entire clause are such persons as, at the daughter's death, are her heirs-at-law, exclusive of her mother and her husband.

But, to bring the devise within the rule in Shelley's Case, the limitation in remainder must be to the heirs in fee, or in tail, as a *nomen collectivum*, for the whole line of inheritable blood. When the testator annexes words of explanation to "heirs," or "heirs of the body," "as to heirs now living," etc., using the terms as mere *descriptio personarum* or for the specific designation of individuals, a new inheritance is thereby grafted upon the heirs to whom the estate is given, 4 Kent, Comm. 221; and they will be assumed to take as purchasers. The rule in Shelley's Case, when applied to real property, enlarges the life estate into an inheritance. The heirs in such case, therefore, take qua heirs, and it is not in the power of the testator to prescribe a different qualification to heirs, from what the law prescribes, when they take in the character of heirs.

For these reasons, we are of opinion that the limitation over, in this case, does not bring the gift within the rule, even if the particular estate should be considered legal. The limitation is to some only of those who would take under the intestate law. The husband and the mother are expressly excluded. It is true they are now both deceased, but that circumstance can have no effect. The testator's intent must be ascertained from, and his will construed according to, the words of the will, and these are to be read in the light of the circumstances under which the will was written. The merely accidental fact that the husband and mother are both now dead does not bear upon the testator's intent at the execution of the will, or determine its meaning when it took effect.

Varnall's Appeal, supra, may perhaps be regarded as authority for the proposition that the exclusion of the husband does not narrow the line of descent, when the donor's intention was to create a trust for the separate

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use of the wife. Mr. Justice AGNEW, delivering the opinion of the court in that case, said: "It is argued that the exclusion of the husbands of the daughters, in the remainder clause, narrows the line of descent. But, clearly, this does not change the intent of the testatrix in this will, for it must be remembered that there were no husbands in existence, and that this so-called exclusion is an expression, corresponding with the intent of the testatrix, which was to give the daughters separate estates, the effect of which would be to exclude the husbands." Whilst this reasoning is not entirely clear, it is plain that it does not extend to the exclusion of the mother.

We are of opinion that the rule in Shelley's Case has no application; that the parties entitled at the death of the testator's daughter take by purchase, and the trust should be upheld to protect their rights.

The decree of the Orphan's Court is affirmed, and the appeal dismissed, at the cost of the appellant.

See, also, Leathers v. Gray, 6 Am. Prob. Rep. 72, and the cross-references.

SCOTT *vs.* NEEVES.

(77 Wisconsin, 305.)

CONSTRUCTION—EVIDENCE—COSTS.

A will provided that whereas N., brother of testatrix, is "indebted individually to the estate of my husband, S., deceased, I direct that such individual indebtedness be paid for him out of my estate," etc. N., while doing business for his brother, had borrowed the money for use therein, and signed his brother's name to the notes by himself as agent. There was no other indebtedness to the estate of the husband by N., and testatrix always regarded and spoke of this as his debt. *Held* to be her intention to direct the payment of this debt.

It was proper to show by parol and other extraneous evidence that

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this was the debt referred to by testatrix, and that she always regarded and spoke of it as the debt of her brother N.

In a suit by the executor of the wife against the two brothers to obtain a construction of the will, it was proper to assess against her estate the taxable costs and reasonable attorneys' fees of all parties.

APPEAL from Circuit Court of Columbia County.

Curtis & Curtis, and *George R. Gardner*, of counsel, for appellant.

Stark & Sutherland, for respondents.

COLE, C. J. There does not appear to be any dissatisfaction with the construction which the learned Circuit Court placed upon the 12th, 14th, 15th, and 19th paragraphs of the will of Mrs. Scott. The executor accepts that construction as correct, and as a full and complete interpretation of the meaning of those paragraphs, and has taken no appeal from those portions of the judgment. So we are relieved from all consideration of these paragraphs of the will, and they may be passed without further comment.

The controversy in this court is mainly over the meaning of the third paragraph, which reads as follows: "Whereas, my brother, *George A. Neeves* is indebted to me in the sum of ten thousand dollars, money loaned, it is my will that the said indebtedness be canceled, and my brother released from all demands and obligations in consequence of the same; and whereas, he is now also indebted individually to the estate of my husband, Thomas B. Scott, deceased, I direct that such individual indebtedness be paid for him out of my estate (so that he may be wholly released from the same), so far as any such indebtedness remains outstanding at my decease."

The question now is, what should be understood by the language used in the last clause of this paragraph? In the answer of the defendants *W. B.* and *George A. Neeves*, they insist that the intention of the testatrix was to provide for the payment of certain sums of money loaned to said *George A.* by Mr. Thomas B. Scott in his life time, and for which the said Scott received

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notes made and signed by said *George A.* in the name of the defendant *William B.*, his brother, as agent of said *William*, and that this was the indebtedness which the testatrix had in mind, and desired should be paid out of her estate to the estate of her husband. The facts in regard to the origin and history of this indebtedness, as found by the Circuit Court, are as follows:

"For three or four years prior to December 11, 1883, and on that date, the defendant *George A. Neeves* was insolvent, and was doing business for his brother, *William B. Neeves*, as his agent, which facts were known to Thomas B. Scott and to the testatrix, Ann E. Scott. On the 11th day of December, 1883, Thomas B. Scott, the husband of the testatrix, Ann E. Scott, loaned to her brother, the said *George A. Neeves*, at her solicitations and request, the sum of $4,000, and received of him as security for such loan four certain promissory notes for $1,000, each bearing date December 11, 1883, and made and signed by said *George A. Neeves*, in the name of the defendant *William B. Neeves*, by the said *George A. Neeves* as agent. There was no understanding or agreement between the parties to said loan, when said notes were given, to secure the same, that they were given, or were to be received, in payment for the money loaned. That said Thomas B. Scott afterwards spoke of and referred to said loan as a loan to said *George A. Neeves*, and always understood, prior to and at the time of his death, that the said *George A. Neeves* was to look after and pay said notes still outstanding, and relied upon him so to do. The money so loaned was used by said *George A. Neeves*, in the business of the Grand Rapids Flouring Mill Company, a corporation of whose business he was manager. Two of said promissory notes given to secure the loan of $4,000 were paid by said flouring-mill company to said Thomas B. Scott prior to his death, and the remaining two notes were still outstanding and unpaid in the hands of the executors of said Thomas B. Scott, to the knowledge of said Ann E. Scott, when her will was made; said unpaid notes being payable, respectively, eight and nine months

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after their date, with interest at eight per cent. per annum; and said notes are still outstanding and unpaid, and are in the possession of *Walter A. Scott* as trustee of the estate of Thomas B. Scott deceased. The testatrix, Ann E. Scott, while she lived, and at the time she made her will, understood the said indebtedness to Thomas B. Scott for said loan, to secure which said promissory notes were so given in the name of *William B. Neeves*, to be the indebtedness of her brother *George A. Neeves* to her husband, Thomas B. Scott, in his lifetime, and to his estate after his death; and she often and uniformly spoke of said indebtedness as the indebtedness of said *George A. Neeves*, and expressed in her lifetime, after the death of her husband, the said Thomas B. Scott, a desire that the payment of said indebtedness should not be enforced by the executors of her said husband's will. The said *George A. Neeves* was not, at the date of the decease of said testatrix, Ann E. Scott, and had not been for many years prior to that date, indebted to said Thomas B. Scott or his estate in any manner or for any amount, either individually or otherwise, except for the balance of said $4,000 loaned and secured by said notes made in the name of *William B. Neeves*; and the said testatrix, at the time she made her will, so understood, and had no knowledge of any other outstanding indebtedness of said *George A. Neeves* to the estate of her said husband, and had no other indebteness in mind. The testatrix, Ann E. Scott, meant and intended by the individual indebtedness of her brother *George A. Neeves* to the estate of her husband, Thomas B. Scott, referred to in the third paragraph of her last will and testament, the indebtedness to the estate of her said husband for the balance unpaid on said loan of $4,000, to secure which said promissory notes had been so given by said *George A. Neeves* in the name of *William B. Neeves*, which indebtedness she understood to be, and was accustomed always to describe and speak of as, the individual indebtedness of said *George A. Neeves*, and she intended to and did, in and by said paragraph, direct that such indebtedness secured by said notes, so far as

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the same might remain outstanding at her decease, should be paid out of her estate."

That there is much evidence in this case which sustains these findings, it seems to me, cannot well be denied. Even if they are not supported by the weight of testimony, there is no such clear preponderance of proof against them as will warrant this court in setting them aside. The argument of plaintiff's counsel, in his contention of the proper meaning of the third paragraph, proceeds largely on the assumption that the testatrix must have had in mind a legal indebtedness of *George A. Neeves* to the estate of Thomas B. Scott,—one which could be enforced by the estate in an action; and, unless such an indebtedness in fact existed when the testatrix died, there is nothing to which the language applies. But this is not the correct view in which to consider the matter. If possible, we must ascertain the intention of the testatrix, and carry that intention into effect. Extrinsic evidence of the facts and circumstances which will explain the language, and show in what sense it was used by the testatrix, is admissible, though, of course, not to change the plain meaning of the words. The words "debt" and "indebtedness" are not always used in the same sense; that is, they do not always import a legal obligation on the part of one to pay another something due him. They often imply a mere moral or equitable obligation, as well as a strictly legal one. In what sense were the words "individual indebtedness" used in this paragraph? Must we assume that the testatrix referred to a strictly legal debt which *George A. Neeves* owed the estate of her husband, and to no other? Or had she in mind an indebtedness which she supposed *George A. Neeves* was legally or morally bound to answer for to the estate of Thomas B. Scott? In the interpretation of the language, it will not do to stop with the inquiry, Did *George A.* in fact and in law, owe a debt to the estate of Thomas B. Scott which could be enforced by action in favor of the estate when the testatrix died? It is an established fact that *George A. Neeves*, as agent, gave the notes of his brother

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William B. Neeves for the loan when it was made. But whether *George A.* borrowed the money for himself or for his brother or to be used in the flouring-mill business, is a question we do not deem it necessary to determine. Certain it is that loan was obtained by him. It is equally certain that Mrs. Scott knew about this loan made by her husband to *George*; and there is good ground for the inference that the loan was made at her request, and that, when she executed her will, she knew that a part of the loan was unpaid. The evidence is clear and satisfactory that she regarded and spoke of this debt as the indebtedness of her brother *George A.* It is not probable that she had any accurate knowledge as to whether he was technically liable at law for the loan, but that she spoke of this debt as the debt of *George* is indisputable. To sustain this statement it is only necessary to refer to her letter written to *George*, dated March 8, 1887, in which she tells him that a note against him for $3,500 had been found among her husband's papers, and asking him "*if he was owing the estate anything besides that* $2,000 *and interest.*" The $2,000 was the unpaid balance of the $4,000 loan; and the $3,500 note referred to was the Bull note mentioned in the case, which was no longer an existing indebtedness against any one. There is much testimony besides this item which shows that, in conversations, Mrs. Scott referred to this indebtedness for the balance of the loan to her brother *George* as his indebtedness; and there can be no doubt, upon the evidence, that this was the indebtedness which she had in mind when she made her will. It is suggested that she referred to the Bull note, but this supposition is completely overthrown by the testimony. She must have had in mind this indebtedness of *George* to her husband's estate for this loan, which she supposed he was liable for, or morally bound to make good; and the learned circuit judge was fully warranted in finding, upon the evidence, that she was accustomed to speak of that indebtedness and always described it, as the indebtedness of *George* to the estate of her husband. We shall not attempt to refer to the testimony which sustains that view, for it is unnecessary.

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But the question remains, Was it competent to show by extrinsic evidence that the testatrix always regarded and spoke of this indebtedness of the balance of the loan as the indebtedness of her brother *George A.* to her husband's estate, so as to identify the subject-matter to which she referred in her will, when she directed that such individual indebtedness be paid for him out of her estate? We have already indicated our view that she did not necessarily nor probably refer to a technical legal liability of *George* to the estate of her husband, but that an equitable or moral obligation on his part to answer for that debt would come within the meaning of the language. But was parol evidence admissible to show that the testatrix used the language in that sense? It seems to us that evidence of the facts and circumstances which tend to disclose the intention of the testatrix, and enable us to understand the meaning and application of her words, was admissible. We think the rule laid down by Prof. Greenleaf sanctions the admission of such evidence to apply the intention of the testatrix, and explain what was the indebtedness to which she referred. 1 Greenl. Ev., §§ 277, 289. The effect of the evidence was not to add words to the will, nor contradict the words used therein, but to explain what was really intended by words of doubtful meaning. It comes within the rule down by Mr. Justice LYON in *Morgan* v. *Burrows*, 45 Wis. 217, where evidence is held admissible in aid of the interpretation of words of uncertain or doubtful meaning. See, also, *Miller* v. *Travers*, 8 Bing. 244; *Cloak* v. *Hammond*, L. R. 34 Ch. Div. 255; In re *Bushell*, L. R. 13 Prob. Div. 7; *Atkinson* v. *Cummins*, 9 How. 479. Judge Redfield states the rule in substantially these words: "The admission of parol evidence in regard to wills essentially the same which prevails in regard to contracts generally. It can be received to show the intention of the testator and especially to enable the court, where the question arises, to give his language such an interpretation as it is reasonable to presume, from the circumstances in which he was placed, he intended it should receive, or to put the court

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in the place of the testator." 1 Redf. Wills, 496. Hence we think there was no error in admitting parol evidence of extrinsic circumstances to show in what sense the testatrix used the word "indebtedness" in the third paragraph of the will. It is apparent that she did not necessarily use it in the strict sense of a legal liability on the part of *George A. Neeves* to the estate of Thomas B. Scott, but might, and probably did, attach a different meaning to it. Of course the intention of the testatrix must have effect given to it.

The other error assigned is the direction in the decision and judgment of the court below as to the payment of costs and disbursements. The court directed that the taxable costs and disbursements of all parties who had appeared in that court should be paid out of the estate of Ann E. Scott, deceased, and that the county court of Lincoln county should make such allowance to the respective parties out of the estate for counsel fees as, in the exercise of sound discretion, might be just. This order conforms to the direction of this court in *Scott* v. *West*, 63 Wis. 588, 24 N. W. Rep. 161, and 25 N. W. Rep. 18; *Webster* v. *Morris*, 66 Wis. 400, 28 N. W. Rep. 353; *Ford* v. *Ford*, 70 Wis. 68, 33 N. W. Rep. 188, —which decisions upon this point we have no desire to disturb.

It follows from these views that the part of the judgment of the circuit court appealed from is affirmed; taxable costs and disbursements of both parties in this court to be paid out of the estate of Ann E. Scott.

By the Court.—Ordered accordingly.

LYON, J., took no part.

TAYLOR, J. This action was commenced in the circuit court by the appellant, executor, etc., for the purpose of obtaining a construction of certain portions of the will of the testatrix, Ann E. Scott. *William B. Neeves* and *George A. Neeves* were made parties to the action as being interested in said will as legatees named

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therein. In the complaint the executor asked for the construction of certain clauses and provisions in said will, but did not ask for any construction of the third clause in said will, which reads as follows: "*Third*, Whereas, my brother *George A. Neeves* is indebted to me in the sum of ten thousand dollars, money loaned, it is my will that the said indebtedness be canceled, and my brother released from all demands and obligations in consequence of the same. *And whereas, he is now indebted individually to the estate of my husband, Thomas B. Scott, deceased, I direct that such individual indebtedness be paid for him out of my estate, (so that he may be wholly released from the same), so far as any such indebtedness remains outstanding at my decease.*"

The contention on this appeal is as to the construction which should be given to the words in italics in this paragraph of the will. In other parts of the will the testatrix gave her brother *William B. Neeves* a legacy of $25,000 and to her brother *George A. Neeves* $25,000 in trust for his children.

The brothers of the deceased, *William B.* and *George A.* appeared in the action, and claimed that the court should construe this clause of the will, as well as the parts asked to be construed by the plaintiff in the action; and they offered evidence tending to show, as they claim, that the clause above quoted, in italics, was intended by the testatrix to refer to a particular claim or debt due to the estate of Thomas B. Scott, her deceased husband, upon a loan of $4,000 made by said Scott in his lifetime, as is claimed, to *George A. Neeves*, and $2,000 of which remained unpaid at the time of the death of the testatrix, and that she intended that her estate should pay and cancel this debt, irrespective of the question whether her brother *George* was indebted to the estate of Thomas B. Scott for any part of such $2,000 at the time of her death, or not. The answer of the respondents upon this part of the will is as follows:

"These defendants further allege that, by the individual indebtedness of the defendant *George A. Neeves* to the estate of Thomas B. Scott, deceased, which, by the

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third paragraph of said will, the said testatrix, Ann Eliza Scott, directed to be paid for him, said *George A. Neeves*, out of her estate, so that he might be wholly released from the same so far as any such indebtedness should remain outstanding at her decease, the said testatrix referred to, and intend to provide for, the payment of certain sums of money loaned to the said *George A. Neeves* by said Thomas B. Scott in his lifetime, and for which said Thomas B. Scott received a note or notes made and signed by said *George A. Neeves* in the name of the defendants *William B. Neeves*, his brother, by him, said *George A. Neeves*, as agent; that, at the time of the decease of said Thomas B. Scott, *George A. Neeves* was not indebted to him except for the moneys represented by said notes, and that the said Ann Eliza Scott knew of the loaning of said moneys by said Thomas B. Scott to said *George A. Neeves*, and supposed at the time she executed said will that the evidence of indebtedness for such loans or loan held by said Thomas B. Scott in form and fact showed the said *George A. Neeves* to be the debtor of said Thomas B. Scott therefor, and it was her intention by said paragraph 3 of said will to cause such indebtedness represented by such note or notes to be paid and wholly satisfied out of her estate. These defendants, *William B. Neeves* and *George A. Neeves*, further allege that the said *Walter A. Scott*, plaintiff, has declared that it is his purpose to enforce the collection of said indebtedness by action upon said notes against said *William B. Neeves*, or otherwise notwithstanding said provision in said paragraph 3 of said will of Ann E. Scott, deceased: and these defendants fear that he will commence and prosecute such action, unless he should be restrained from so doing by order of this court. Wherefore these defendants pray that it may be adjudged and determined by the court that it was the intention of said Ann E. Scott, in and by said third paragraph of her will, to provide for the payment of said notes, and of the indebtedness represented thereby, by the plaintiff, as the executor of her said will, out of her estate, and that said third paragraph of her said

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will be, by the judgment of this court, construed as referring and applying to said indebtedness, and said notes given therefor, and that the said plaintiff be enjoined by the final judgment in this action, and also during the pendency thereof, from selling, transferring, or in any manner disposing of said notes or commencing or prosecuting any action thereon against said *William B. Neeves* or said *George A. Neeves*, or otherwise attempting to collect the same."

On the trial in the circuit court the respondents were permitted to introduce evidence, under objection by plaintiff, which it is claimed, tends to show that the testatrix, by this clause in her will, intended to cancel any debt due to the estate of her deceased husband on account of said $4,000 loan, irrespective of the question as to who owed the debt, and it is insisted that it makes no difference as to the construction of this clause of the will whether *George A.* was at the time of her death, or at any other time, indebted to Thomas B. Scott or to his estate for said sum so loaned, or any part thereof. After hearing the evidence in the case, the learned circuit judge made findings upon this question numbered 23, 24, 25, 26, 27, 28, 29, 30, 31, and 32. The thirty-second finding of fact reads, as follows: "The testatrix, Ann E. Scott, meant and intended by the individual indebtedness of her brother *George A. Neeves* to the estate of her husband, Thomas B. Scott, referred to in the third paragraph of her last will and testament, the indebtedness to the estate of her said husband for the balance unpaid of said loan of $4,000, to secure which said promissory notes had been so given by said *George A. Neeves* in the name of *William B. Neeves*, which indebtedness she understood to be, and was accustomed always to describe and speak of as, the individual indebtedness of said *George A. Neeves*; and she intended to and did, in and by said paragraph, direct that such indebtedness secured by said notes, so far as the same might remain outstanding at her decease, should be paid out of her estate."

And the court found, as a conclusion of law, as fol-

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lows: "It should be declared and adjudged by the judgment of the court herein that, in and by the latter clause of the third paragraph of her will, construed and interpreted according to the true intent and meaning thereof *first* the said testatrix, Ann E. Scott, directed the payment by her executor, out of her estate, to the estate of her deceased husband, Thomas B. Scott, of the said sum of two thousand dollars, being the unpaid balance of principal of the four thousand dollars loaned by said Thomas B. Scott to *George A. Neeves* December 11, 1883, and secured by two notes of *William B. Neeves* of that date, made by *George A. Neeves* in his name and as his agent, for one thousand dollars each, due, respectively, eight and nine months after date, and bearing interest at the rate of eight per cent. per annum, together with interest upon said two thousand dollars at the rate of eight per cent. per annum from December 11, 1883, according to the terms of said notes."

The plaintiff duly excepted to the findings of fact and conclusions of law.

It is not contended by the learned counsel for the appellant that the judgment would not be right if there was sufficient evidence in the case to show that *George A. Neeves* was indebted to the estate of Thomas B. Scott, directly or indirectly, for this $2,000, at the time of the death of the testatrix; but it is insisted that the whole evidence in the case shows conclusively that *George A. Neeves* was not at the time of her death, or at any other time indebted to Scott on account of said loan, and that Scott or his executor has never made any claim on *George A.* on account of such loan. I agree with the contention of the learned counsel for the appellant on this point. My reason for agreeing with their contention is based on the fact that *George A.* never received any benefit from said loan, so far as the evidence in this case tends to show, and that *William B. Neeves* received all such benefit, and his notes were given to and accepted by Scott as the evidence of the indebtedness at the time the loan was made, and further rely upon the written

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statement of *George A.* made within eight months of the death of the testatrix that he owed the estate of Thomas B. Scott nothing.

I do not understand that even the learned counsel for the respondents place great reliance on the fact of the actual indebtedness of *George A. Neeves* to the estate of Thomas B. Scott at the time of the death of the testatrix to sustain the judgment entered in the case. Their principal reliance is upon the claim made that the testatrix intended by her will to direct her estate to pay the amount due the Scott estate on said $4,000 loan at the time of her death, without any regard as to who was the debtor. In my opinion, the evidence in this case fails entirely to show any such intent on the part of the testatrix, admitting that it was competent under the law to show by parol evidence that such was her intention. It seems to me very plain that the testatrix, by this statement in her will, intended to benefit her brother *George* and no one else. It is urged that she supposed that *George* was indebted to her deceased husband upon two notes of $1,000 each, and that it was these notes she intended to have paid out of her estate. This contention, it appears to me, is not probable, nor is it sustained by the evidence. There is evidence enough to show that she knew of the existence of these notes, and there is also an abundance of evidence that she knew that these notes were not signed by her brother *George*, but were signed by her brother *William B.* Now, it is almost too clear for doubt that, if the testatrix had intended to provide for the payment of these notes without regard to the fact whether her brother *George* was liable for their payment, she would, most naturally, have so stated in her will, and have directed their payment; but if she intended that they should be paid out of her estate only in case *George* was liable for their payment, she would have directed just as she did in her will. The language of the will to my mind, excludes the idea that she intended to pay those two notes in any event, whether *George* was liable for their payment or not. Had the evidence shown

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that the testatrix did not know that *William B.* had given his note for the $2,000, there would be some reason, perhaps, for saying that she intended to pay this debt in any event; but, when she knew of the liability of her brother *William B.* to pay this debt, and still provides only for the payment of the debt of *George*, it seems to me she excludes the idea that that particular debt shall be paid whether *George* be liable to pay it or not.

It is urged that she supposed *George* was liable to pay this debt, and so it ought to be paid out of her estate. The fact that she supposed *George* liable for the debt can make no difference. Suppose *George* had given his notes for this debt, but, before his sister made her will, he had some arrangement between himself and some stranger by which, for a valid consideration, he had been released from the debt, and such stranger had become liable to pay the same to the estate of her husband. Can it be possible that such stranger could have insisted that the debt should be discharged out of her estate, under the language of this will? Who will be benefited by the payment of this debt out of the estate of the testatrix? Certainly no one else than *William B.*; and when the debt of *William B.* is discharged by the estate of his sister, he will be under no legal or moral obligations to pay the amount to *George* and so a provision in her will clearly intended to benefit her brother *George* is by the judgment of the court made to benefit *William B.*, without one word in her will or any intention shown in the evidence that she intended to benefit her brother *William.*

The only reason that could be urged with any plausibility that the testatrix intended that this $2,000 should be paid irrespective of the question as to who was the debtor must rest on the idea that she supposed that the money which was loaned went into the mill business, and so benefited *George* and whatever relieved the mill business would benefit him. But the evidence of *George* and *William B.* both rejects this theory of the case. *George* claims no interest in the mill business ex-

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cept to the extent of $25, and *William B.* in no way recognizes his interest in that business beyond his ownership of one share of the stock, of the par value of $25. Why, then, should the mill-owners be relieved from the payment of the $2,000 which they have received and used in their business by a clause in this will which is clearly intended to benefit *George* and *George* only? If this $2,000 be paid out of the estate of the testatrix, so far as the evidence in this case shows, no one will be benefited except the owners of the stock of the mill company, some of whom are entire strangers to the testatrix, and in no way the objects of her bounty. If, after this debt of the mill-company was paid out of her estate, where would be a legal claim on the part of *George* to demand the money of the mill company, the case would have a different aspect, and it might be claimed that the intention of the testatrix would be accomplished substantially as she intended. If it could be shown from the evidence in this case that the payment of the $2,000 out of the estate of the testatrix would inure to the benefit, in any way, of *George A. Neeves,* I should not feel that the intention of the testatrix had been defeated, although in that event it would be taking the $2,000 out of the estate of the testatrix, and giving it as an absolute legacy to *George,* and not simply the canceling of a debt due from *George* to the estate of Scott.

It is said that the testatrix might recognize *George* as the debtor to the estate of Scott for the $2,000, whether there was any legal liability on his part or not; but then, to carry out her intention to benefit *George* to the extent of such indebtedness, the court ought to declare the Scott estate a trustee of the $2,000 when collected of *William B.* for the benefit of *George* and the estate directed to pay *George* the $2,000 when collected. Such a decree would carry out her intent to benefit *George* and not the mill company, which can alone be benefited under the judgment entered in this case.

The evidence in the case shows that if even at any time, *George* was indebted to the estate of Scott for this

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loan, such indebtedness was for a valuable consideration assumed by his brother *William B.* or by the mill company. The consideration for such assumption of the debt was the receipt by the mill company from *George* of the whole amount of the money loaned, and the giving of the note of one of the principal stockowners for the payment of such loan, which note was accepted by Scott in full satisfaction of such debt by *George*. Suppose *George* had in fact given his own note to Scott for this $2,000 and this fact had been known to the testatrix, but before her death, and without her knowledge, *George* had paid the $2,000 note to Scott by giving Scott the note of his brother *William*, *William* having received from *George* a sufficient consideration for his note for $2,000. Is it possible that *William* could have received the benefit of this provision in the will of the testatrix? And yet this is, substantially, what the evidence in the case shows. *George* owes nothing to Scott, because he has in fact received nothing from him. *William* does owe Scott the $2,000, and has received a full consideration for his promise to pay the debt. Now, if his debt is paid out of the estate of the testatrix, he and he alone, is the beneficiary under the will, instead of *George*; and, contrary to the express terms of the will, declaring the provision for the benefit of *George*, the entire benefit goes to *William B.*, with no liability over to *George* after his debt is satisfied and discharged. The fact that the testatrix supposed *George A.* owed this debt is the strongest evidence that she did not intend that her estate should pay it, unless he did in fact owe the debt. If she had intended this debt should be paid irrespective of who owed the debt, it is to me very certain she would not have used the language she did use in her will.

It seems to me so clear that the judgment of the circuit judge is in conflict with the intention of the testatrix expressed in her will that I am constrained to dissent from the decisions of this court sustaining such judgment.

A motion for a rehearing was denied.

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CODY *v.* BUNN.

(46 New Jersey, Equity, 131.)

CONSTRUCTION — WORDS AND PHRASES — "OR" OR "AND" — "AND" OR "OR."

Courts, sometimes, in construing wills, read "or" as meaning "and," and "and" as meaning "or," but such departures from the words of the will are never made, except it is plain that it is necessary to do so in order to give effect to what appears to be the clear intention of the testator. All doubts are to be resolved in favor of the testator's having said exactly what he meant.

ON demurrer to the bill.

Frank E. Bradner, for complainant.

James L. Griggs, for defendant.

VAN FLEET, V. C. This is a suit for a legacy. Whether the complainant is entitled to recover or not depends entirely on the construction which shall be given to the will of Conrad Bunn, deceased. The testator died in June, 1866. By his will after directing the conversion of all his estate into money and the payment of his debts and funeral expenses, he said: "I do give and bequeath the balance to my five children equally, except as is hereinafter mentioned. To my son Martin Bunn, the one-fifth of my said effects; to my son William C. Bunn, the one-fifth do.; to my son John Bunn the one-fifth do.; to my son Ferdinand, the one-fifth of my said effects, *or to each of their lawful heirs*; and to Mary Ann Bunn, my daughter, and wife of David Williams, the use of the interest of the one-fifth of my said effects, except in case the said Mary Ann, wife of the said David Williams, has heirs, or an heir, at the time of her death, then the said share to equal; if not, then said share of the said Mary Ann, wife of said David Williams, to revert back to the above-mentioned Martin Bunn, William C. Bunn, John Bunn and Ferdinand Bunn, *or their lawful heirs*. And I do hereby order my executors to pay to the said Mary Ann, wife of the said

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David Williams, the interest due on the one-fifth of my effects, each and every year, to the time of her death." Four-fifths of the testator's estate were paid to his four sons in 1867. Mrs. Williams, who was entitled to the interest of the other fifth during her life, died in April, 1889. She left no child or descendant of a child at the time of her death. Counsel stated on the argument that they were agreed in opinion that it is plain that the testator meant by the words "heirs or an heir," in designating who should take the principal of the one-fifth on the death of the life-tenant, the children or child of the life-tenant. I concur in that view; and I am also of opinion that what the testator meant by the words "then said share to equal," is that then said share shall be equally divided among them, so that, if the testator had put in words all that he intended to say, that sentence of his will would have read in this wise: "Except in case that said Mary Ann, wife of the said David Williams, has heirs or an heir at the time of her death, then the said share shall be equally divided amongst them." John Bunn, one of the testator's four sons, died in the lifetime of his sister, Mrs. Williams, leaving an only child and also leaving a will. John gave all his property to his executor. The complainant sues in the right of John's child, the child having assigned to the complainant all his right under his grandfather's will. The question to be decided is whether the complainant, or John's executor, is entitled to that part of the testator's estate, set apart for the use of Mrs. Williams during her life, which would have been payable to John in case he had survived Mrs. Williams. John's executor will be entitled to prevail in this suit, unless it shall be found that by the true meaning of the will the testator meant, in case John died during the life of Mrs. Williams, his share of the fund set apart for her use should go to his children or child.

The words to which we must principally look in trying to discover the testator's meaning are these: "if not,"—that is if Mrs. Williams does not leave children

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or a child at the time of her death, "then said share of the said Mary Ann, wife of said David Williams, to revert back to the above-mentioned Martin Bunn, William C. Bunn, John Bunn, and Ferdinand Bunn, or their lawful heirs." But for the words "or their lawful heirs," or if the words had been "and their lawful heirs," there can be no doubt that, according to well-established rules of construction, John would have taken a vested interest, such as would not have been subject to be defeated by his death in the lifetime of his sister. But the presence of these words renders that construction impossible, unless we say that they mean nothing; and that cannot be said truthfully in this case, because it is quite plain, as I think, that they were used to show that the testator meant, in case the primary legatee or parent was not alive when the legacy became payable, his children or child should take it: or unless we say that the word "or" should be read as meaning "and," and thus make the gift to John Bunn and his lawful heirs, and not, as it now stands, to John Bunn or his lawful heirs. Courts, it is true, sometimes, in construing wills, read "or" as meaning "and," and "and" as meaning "or," but such departures from the words of the will are never made, except it is plain that it is necessary to do so in order to give effect to what appears to be the clear intention of the testator. *Holcom v. Lake*, 4 *Zab.* 683-688, on error, 1 Dutch, 605. All doubts are to be resolved in favor of the testator's having said exactly what he meant. *Courter v. Stagg*, 12 C. E. Gr. 305-307. The testator, it is important to observe, used this phrase, or one substantially like it, in a prior part of his will. In giving direction as to how the residue of his estate shall be divided he says that one-fifth of it shall be paid to each of his four sons, and then adds, "or to each of their lawful heirs." The purpose of this provision is quite plain. He meant to provide against a lapse in case either of his sons died in his lifetime, leaving issue. Our statute rendered such a provision unnecessary to prevent a lapse, but the phrase is none the less signifi-

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cant, as evidence that the testator intended that if the primary legatee did not live to take the legacy, his children or child should take it by way of substitution.

The meaning of the testator seems to me to be quite obvious. Looking at the whole of that part of the will which is brought in judgment, and giving full effect to all its words, I think it quite clear that the testator meant that if Mrs. Williams died without leaving a child, and that if either of his sons died in Mrs. William's lifetime, and left a child, such child should take as substituted legatee, that part of the fund set apart for the use of Mrs. Williams which its father would have taken if he had survived Mrs. Williams. The testator meant that the perosn who took his property should be of his own blood. This construction conforms to precedent. *Finlason* v. *Tattoch*, L. R. 9 Eq Cas. 258, the testator directed that the residue of his estate should be invested, and the interest of it paid to his widow during life, and he then said, "and at her decease the principal and interest to be equally divided amongst my children, or their heirs." One of his children died in the widow's lifetime, having, however, first made an assignment of his share of the residuary estate. The question presented for judgment was whether or not the assignee acquired anything by the assignment. The master of the rolls, Lord ROMILLY, held that he did not. He said: "I have no doubt that the meaning is to give by way of substitution. He gives a share to each child, and, if the child be dead, to his heirs, that is, the next of kin, according to the statute."

The complainant is entitled to recover.

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RIKER *vs.* LEO.

(115 New York, 93.)

CHARITABLE BEQUESTS—BENEFICIARIES.

A bequest in remainder "to any responsible corporation in this city, existing at the time of the death" of the precedent legatee, "whose permanent fund is established by its charter for the purpose of ameliorating the condition of the Jews in Jerusalem, Palestine, * * * by promoting among them education, arts, and sciences, and by learning them mechanical and agricultural vocations," does not pass to a corporation whose object, as shown by its charter, is to contribute "to the relief of the indigent Jews in Jerusalem, Palestine," of which testator, a lawyer, was an incorporator and president at the time of executing the will, and which the will does not mention, though there is no other corporation in existence, at the time mentioned, which can take the legacy.

APPEAL from Supreme Court, General Term, First Department. Action to construe the will of Sampson Simson, deceased, brought by John H. Riker, his sole surviving executor, against Sampson Simson Leo, impleaded with the North American Relief Society for the Indigent Jews in Jerusalem, Palestine. A judgment in favor of the society was affirmed by the General Term of the Supreme Court, and Leo appeals.

John E. Parsons, for appellant.

Adolph L. Sanger, for respondent.

GRAY, J. In this action the plaintiff seeks to have it determined whether, under the will of the decedent, the defendant Leo, or the defendant "The North American Relief Society for the Indigent Jews in Jerusalem, Palestine," is entitled to the capital of a certain trust fund of $50,000.

It was claimed by each, and thus far in the court below the society has been successful. The testator left the fund in trust to his executors, to apply the income thereof to the support of a nephew. When he died the executors were directed to pay the same "to any re-

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sponsible corporation in this city, existing at the time of the death of my said nephew, whose permanent fund is established by its charter for the purpose of ameliorating the condition of the Jews in Jerusalem, Palestine, and I desire such corporation annually to transmit the interest received on said $50,000 to Jerusalem, Palestine, to ameliorate the condition of the Jews living there, by promoting among them education, arts, and sciences, and by learning them mechanical and agricultural vocations. * * * In case my disposition of the $50,000, as provided for by the last clause of this my will, shall fail, and not take effect, then I give and bequeath the said principal sum of $50,000 equally to the children of my niece, Jochebed M. Simson Leo," etc.

The defendant Leo, appellant here, is the only child of testator's niece, Jochebed. The respondent society claims to be entitled to the fund as being a responsible corporation, having a permanent fund, established by its charter, the interest of which is to be "*annually applied to the relief of indigent Jews in Jerusalem, Palestine.*" At the time of testator's death, in 1857, this society had been in existence for about four years. He was then its president, and was one of its incorporators. It was found that no corporation other than this society existed in New York city at the time of the death of testator's nephew which could make any claim to be entitled to the fund; and as to its claim the executors did not think it could legally perform the duties required by the testament.

The question of the right of the society to take this fund is invested with such difficulties as, in my opinion, seem to be insurmountable. Though the clauses under consideration are not written with much carefulness in expression, there is no difficulty in understanding the testator's intentions. They are clear enough, whether with regard to the benevolent purpose, or with regard to the event of its failure, by reason of the non-existence of such a corporation as he contemplated, to be the trustee of this fund. Nor does the appellant appear in that ungracious attitude of seeking to frustrate a

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testator's benevolent wishes, which deprives the claim of the adventitious aid of a sympathy in its presentation and prosecution; for, on the face of the matter, there is an obvious distinction between the objects, as expressed by the testator in his testamentary provision, and those for which this society exists. The society's objects are, as appear from its title and charter, to contribute "*to the relief of the indigent Jews* in Jerusalem;" while those of the testator were to ameliorate the condition of those living there "by *promoting among them education, arts, and sciences, and by learning them mechanical and agricultural vocations.*" Clearly, in the accomplishment of the one purpose is involved the idea of charity, and of the other an educational system. Ideas which, while having their rise in and often owing their fulfillment to the same source, in the benevolence of individuals, are quite distinct in their aims. Therefore, for the appellant, as the contingent legatee of the testator's bounty, to say that his uncle's will is not being effectuated by paying over the money to this society, seems rather a contention in defense of the will than an attempt to defeat any part of it. In addition, his position is fortified by being in harmony with that taken by the executors.

The testator has here constituted a trust with regard to the fund by limiting its use to certain prescribed purposes. The gift is not absolute, but is qualified by imposing upon the taker the performance of certain duties, through the means of the income from the fund. We cannot free the bequest from the conditions imposed upon its use without wholly frustrating the testator's purpose. The "desire" which he expresses has here the force of a command, because it expresses the object testator had in view when making the bequest. It is very clear that where the donee of property is "desired" or "requested" by the testator to dispose of that property in favor of others, those words are imperative and their use will create a trust. (See 1 Williams' Ex'rs, 88; *Van Dyck* v. *Van Beuren*, 1 Caines, 84.)

It may be admitted that the fact that this society

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may not be the particular donee intended by the testator will not control the legal effect of his language, if the society can legally claim the gift, because of a legal capacity to effectuate the benevolent trust. The finding of fact by the learned judge at Special Term was that the testator did not intend to give this fund to this particular corporation, but to any corporation which could answer the description given by his will. Notwithstanding that the intention of the testator with respect to this society may not be controlling, it is impossible for it to be without its effect. The finding of fact could not well have been otherwise, when we consider the circumstances. It is altogether inconceivable that a testator, intending a certain existing corporation to take under his will, should not only fail to name it, but should fail to describe its chartered objects with some approach to accuracy, when he was an incorporator, and its principal officer. The testator was not a layman, but a lawyer; a fact deserving of attention. If we conclude that testator did not suppose this society capable of receiving this fund, are we not bound to scrutinize most closely its right to it, in view of the fact that he must have known, as a founder, what were its scope and projected aim? It is suggested on behalf of the society, as a reason for the testator's not designating it by name, that it must have occurred to him that, before the close of his nephew's life, the society might have discontinued operations, or might have become irresponsible. This is an ingenious suggestion, but hardly one which has sufficient force to remove the obstacles to our finding and understanding in the testator that this society would take. I have adverted to the circumstances at the time the will was executed as illustrating the testator's close connection with this institution, and the singularity of his omission to designate it, or to describe its corporate objects, if he had it in mind as competent to execute his benevolent purpose. When we are aided by extrinsic proof in the case, we should, after we have read the will, endeavor to place ourselves in the situation of the testator and thus ascertain his intentions and purposes.

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His position with regard to the society, taken in connection with the fact of his being a lawyer, leaves no room for us to doubt as to his understanding of the legal status and aims of that corporation. He knew that its authorized corporate objects were to relieve indigent Jews in Jerusalem. He could not be supposed to be unaware of the distinction between performing those charitable offices, which indigent individuals demand at the hands of their fellow-men, and the expenditure of moneys in building up an educational system among the members of his race who resided in a distant land; not so favored as other lands were with the advantages of schools and academies of general learning.

The testator's description of the corporation to which the money should be paid, as one whose charter established a permanent fund for the purpose of ameliorating the condition of the Jews in Jerusalem, does not agree with the stated objects of the charter of this society, if we read language with the meaning which the ordinary and usual sense and import of words convey. That the testator did not understand his description to refer to a corporation whose chartered objects were to administer charity to the poor and needy, is evidenced by his subsequent definition of what he understood by ameliorating the condition of those of his race who dwelt in Jerusalem. He defines it as the promotion among them of "*education, arts, and sciences and learning them mechanical and agricultural vocations.*" His purpose was liberal and benevolent; not such as is commonly understood by the courts as charitable. This society is limited by its charter to works of charity; and, while charitable work is promoted by benevolence, and a charitable society may be termed a benevolent society, there is a wide distinction between that object of benevolence and one which aims at maintaining an educational system. To relieve the indigent means to administer to their pressing and recurring wants; to give them food, and prevent them from falling into beggary.

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It is a well known and notable fact with the Jewish race that their poor are so generally well taken care of as to make a Jew beggar almost an unknown spectacle. But to educate individuals does not relieve their indigence. Schools and lectures will not relieve the daily wants of families, or keep the wolf from the door. The general education afforded by the state, or by the benevolence of individuals, results in a few persons, in the general number, concentrating in themselves, by superior aptitude, the principles of learning which the books and the teachers have taught them. These few may be enabled to make use of these principles by some practical application, and thus may be able, eventually, to improve their condition; but it cannot correctly be said that furnishing one with education relieves him from want. Many a student has starved, and many a scholar has suffered from physical privations which his wealth of learning and stores of knowledge were useless to him to relieve. The promotion of education in the arts and sciences, and in mechanical and agricultural vocations, means to furnish all with the means of acquiring knowledge, irrespective of their wealth or poverty. I think we could not, strictly, and therefore, should not here say that a society constituted to relieve indigence comprehends an original design or purpose to educate persons in the arts and sciences, or to follow a vocation. The objects are sympathetic, as are all the objects of benevolence; but they are distinct in their aim and in their prosecution.

It is quite conceivable that the testator, aware of the absence in Palestine of the opportunities for the various forms of education, sympathized with the members of his race in their deprivation, and felt that there was a field for benevolent action open which would strongly appeal to others, who like himself, had had so many advantages offered to them. I think it is quite probable that what the testator intended was to hold out an inducement to the formation of such a corporation as he describes. He knew there was none such in New York city, but may have hoped that the influence

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of his example upon the rich and benevolent members of his race in that city, and the certainty of the eventual acquisition of this fund, might result in the incorporation of such a society.

I do not think the objects and purposes to which the charter of this society limits it, comprehend the objects and purposes which the testator prescribes; and it should not, therefore, be permitted to take under this will. In each case, where a corporation claims the right to take under a will, that right may be the subject of severe scrutiny. Its right to take at all is derived from the act of incorporation, without the dispensation of which from the general statutory prohibition the corporation could not take. This bequest constitutes a trust for a purpose not included within those retained by the statute abolishing all uses and trusts, and unless, therefore, the purpose is comprehended within those which the chartered powers of the corporation enable it to effect, the bequest must fail.

The respondent cites the cases of the wills of *How* (10 N. Y. 84), and of *Hallgarten* (110 N. Y. 678, 18 N. E. Rep. 482,) where legacies were sustained; though in the former case the corporate name of the institution was not stated, and in the latter case the bequest was to an unincorporated society. The *Hallgarten Will Case* (reported as *Matter of Wehrhane*, in 110 N. Y. 678, 18 N. E. Rep. 482), does not touch the present case, because there the "Newsboys' Lodging-House" was a branch department of the Children's Aid Society, to which the testator had already also given a legacy. In the case of *New York, Institute, etc.*, v. *How's Ex'rs* (110 N. Y. 84) the court held that it was a question of identity, arising upon description, and that the point was whether the legatee can be found. It was held that, though the act of incorporation did not bring the objects of the institution within those described in the will, the "subsequent legislation so far modified the charter of the corporation in those particulars that when the will was made these several circumstances had all been ingrafted upon it, and might well enter into a description of its

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general scope and purposes." As the court found in that case that "the corporation which claims the legacy completely answers the description which the testator has given," it was a logical result to sustain its claim.

I admit the principle invoked by the respondent that where the intention is apparent the court must give such a construction as will support the intention of the testator. It is one too well settled and too often invoked by judges to be overlooked. It is upon that principle that courts of justice act in construing wills. Where the apparent intention is commendable, as in this case, courts may strain in their effort to give it effect. But we have here a case where the testator's intention, as derived from the extrinsic circumstances, and from the language of his will, would appear to exclude the respondent society. The omission to name this society, or to describe more aptly its chartered purposes, is as highly significant as it is certain that the society does not fall within the class of corporations described. In order to execute such a trust as is here contemplated, some legislative action or amendment of the charter would be required, which would enable it to comprehend the promotion and maintenance of educational enterprises within the scope of its chartered powers. Now a corporation can exercise no other powers than those expressly conferred by the charter, and those which may be necessary to the exercise of the powers so given. For us, therefore, to sanction the claim of this society to the fund, would be to disregard the provisions of the Revised Statutes with respect to the powers of corporations, and to hold that a corporation upon which is conferred the capacity to perform a certain function, may take upon itself the performance of other functions, which are in their nature distinct and different.

The appellant has also presented the point that the bequest was void for indefiniteness. The direction of the testator was to pay the money to "*any responsible corporation in the city, existing at the time of the death of his nephew, whose permanent fund*," etc. Unquestionably,

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if there were more than one such society in existence at the time, the gift would be void for the uncertainty. The learned justice at special term conceded that, and found great difficulty in reaching his conclusion to sustain the claim of this society. He confessed his doubt, but thought, upon the facts of this particular case, the bequest might be sustained. Inasmuch as, in his opinion, this society answered the description of the will, and as it was the only one in existence, he upheld its claim. The learned justice at general term thought the bequest sufficiently definite, under the authority of *Powers* v. *Cassidy* (79 N. Y. 602). The objection is a very grave one; but, inasmuch as I conclude that this society is not the one described in the will, and that it cannot legally execute the benevolent trust purposed by the testator, I think discussion needless upon this head.

The judgments below should be reversed, and, as a new trial could not be productive of any different result, judgment absolute should be entered for the appellant Leo, with costs, to be paid out of the estate.

All concur.

See, also Beardsley v. The Selectmen, 5 Am. Prob. Rep. 298, and the note.

BEEBE *v.* MCKENZIE.

(19 Oregon, 296.)

DEEDS—CONSTRUCTION—ESTATE IN FUTURO.

In construing an instrument to determine whether it is a will or deed, the intention is to control as collected from the whole instrument. Where an instrument conveys a present title to the grantee, and the grantor reserves out of the estate conveyed the right to the use and possession during his life, the instrument is a deed, and not a will. Such an instrument does not create an estate in freehold to commence *in futuro*, and is not within the technical rule of the common law applied in such cases.

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APPEAL from Circuit Court, Union County; JAMES A. FEE, Judge. This is an action of ejectment brought by the plaintiff against the defendant to recover the land described in the complaint. Both parties deraign title to the land from one Thomas McKenzie, deceased, —the plaintiff by deed, and the defendant as an heir-at-law. The cause was tried without the intervention of a jury, and judgment went for the plaintiff, from which this appeal is brought. At the trial the plaintiff, in support of her claim, offered in evidence the following instrument in writing: "This indenture witnesseth that Thomas McKenzie for the consideration of the sum of one dollar to him paid, has bargained, sold, and quit-claimed, and by these presents does bargain, sell, and quit-claim, unto Fannie C. McKenzie, the undivided one-half of the following described property, to wit: * * * The foregoing sale and conveyance is understood and agreed to be completed and done at the death of the said Thomas McKenzie, and that the possession and right of possession to and in the foregoing premises remains and rests, until his death, in the said Thomas McKenzie, in consideration of the marital will and assistance extended by the said Fanny C. McKenzie, retains to himself only the life proprietorship and ownership of the forgoing property, and conveys to her all other rights which the said Thomas McKenzie may have therein. Said Thomas McKenzie shall not sell nor attempt—the said premises, but shall occupy the same during his lifetime. To have and to hold the said premises, with their appurtenances, unto the said Fannie C. McKenzie, heirs and assigns, forever. In witness whereof," etc. "THOMAS MCKENZIE. [Seal.] Done in the presence of JOHN MCDONALD, A. MEACHAM." Then follows the acknowledgment, etc., to the introduction of which the defendant objected, which the trial court over-ruling, the said instrument was admitted as evidence, and the ruling of the court in admitting the same is the error assigned on this appeal.

Shelton & Carroll, for appellant.

T. H. Crawford, for respondent.

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LORD, J. The only question presented by this record is as to the validity of the above instrument as a deed, the defendant contending that, although in form a deed, it is a will, but, if not a will, that it is a deed that attempts to create an estate to commence *in futuro*, and is therefore void. To determine the nature of an instrument, the intention of the maker, to be collected from the whole instrument, subject to the rules of law, is the pole star by which to be guided. The fact that it is in form and phraseology a deed signifies nothing; if it is plain from the language used, and what is appointed to be done after the maker's death, that it is testamentary in its nature, it is a will. But if it is plain that it was the intention of the grantor to convey a present estate, though the possession may be postponed until after his death it is a deed, and not a will. The estate would stand created, but the possession or enjoyment of it postponed. The evidence of this intention, as afforded by the instrument, is that it is in the form of a deed of conveyance. It was made in consideration of "marital will and assistance extended," and was executed with the usual formalities prescribed by law. The grantor acknowledged before the proper officer that "he executed the same freely, for the uses and purposes therein named," and used words, namely, "has bargained, sold, and quit-claimed, and by these presents doth bargain, sell and quit-claim," that are specially appropriate in a deed, and not in a will. In the instrument itself it is referred to as a "conveyance," and the grantor delivers it as such to the grantee, who has it recorded as a deed. While this is not denied, it is urged from other language used in the instrument, that the grantor never intended to convey to the grantee any present interest or estate in the land, but only an estate limited to take effect after his death, or to commence *in futuro*. The clause is not clear, and its language is much involved; but it seems to us the intention is to convey the fee *in præsenti* to the grantee, the grantor reserving out of it the possession or enjoyment during his life.

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According to its terms, it is "the possession and right of possession" that "remains and rests" in the grantor, of which he "only retains to himself the life proprietorship" in consideration of "marital will and assistance extended" by his wife. The intention is to convey presently the freehold or fee to the grantee, subject to the grantor's possession and use during his life. It is to take effect, or took effect, in interest, upon the execution of the instrument, though the right of possession was postponed until after the death of the grantor. If this construction be correct, the intention of the grantor was to convey the land at the time the deed was executed and delivered, and to reserve to himself out of the estate conveyed the use and possession during his life. Looking at the whole instrument, it evinces a favorable intention to the grantee, nor does it contain any revokable words, or other language which indicates that it is testamentary in its nature. The language is "does bargain, sell, and quitclaim," and the grantee is "to have and to hold the said premises," etc., "heirs and assigns, forever." From all this, it is clear that the instrument is not a will, but a deed, and conveyed a present title to the grantee, out of which the grantor reserved to himself the use and enjoyment of an interest during his life. As such, it was not a deed to commence *in futuro*, or to take effect at the death of the grantor; and therefore renders it unnecessary for us to consider whether, under our statutes and the policy of our laws, the technical rule of the common law in respect to creating estates to commence *in futuro* prevails.

There is no error, and the judgment must be affirmed.

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ROYCE *vs.* ADAMS.

(123 New York, 402.)

RESIGNATION OF TRUSTEES — APPOINTMENT OF SUCCESSORS—POWER OF SALE.

Code Civil Proc. N. Y. § 2818, provides that when a sole testamentary trustee dies, becomes a lunatic, is removed, or resigns, and the trust has not been fully executed, the Surrogate's Court may appoint a successor, unless such appointment would contravene the express terms of the will. *Held*, that, notwithstanding the use of the word "sole," the provision applies to a case where there are several trustees, and all resign.

Upon the death of a trustee, under 1 Rev. St. N. Y. pp. 730, 731, §§ 71, 72, the trust devolves upon the supreme court, and it has jurisdiction to appoint trustees, with full power to execute the trust.

Where a power of sale is conferred by the will upon the executors, or "whoever shall execute this will," it is not a personal trust, and may be executed by trustees lawfully appointed to succeed the executors, who have resigned.

APPEAL from Supreme Court. General Term, second department.

Alton J. Vail, for appellant.

W. J. Groo, for respondents.

EARL, J. The testator, Henry R. Low, devised and bequeathed to his executors all his real and personal estate upon the trusts mentioned in his will, and authorized them to sell, lease, or otherwise convey or dispose of any of his real or personal estate, and to give a good title thereto. Before the estate was completely settled, all the executors and trustees named therein resigned. Thereafter, by an order of the Surrogate's Court, and subsequently, by an order of the Supreme Court both properly made, these plaintiffs were appointed trustees, under the will, in the place of those who had resigned; and the question is whether they have authority to execute the power of sale contained in the will.

While it is not expressly provided what shall be done with the proceeds of the sales of property, it is implied

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that they must be held and disposed of for the purposes of the will.

Here the trust survived the resignation of the testamentary trustees, and hence the surrogate had authority to appoint the new trustees, under section 2818 of the Code, which provides that when a sole testamentary trustee dies, or becomes a lunatic, or is, by a decree of the Surrogate's Court, removed, or allowed to resign, and the trust has not been fully executed, the Surrogate's Court may appoint a successor, unless such appointment would contravene the express terms of the will. It is true that this provision mentions only a sole testamentary trustee; but the language of the whole section shows that it was the intention to provide for a case where all the testamentary trustees died, or resigned, and that there was no purpose to confine it to the case of a sole testamentary trustee. Hence these plaintiffs could base their authority to act as trustees under the will, and to execute the power therein conferred upon the testamentary trustees upon their appointment by the surrogate.

But, if that appointment was insufficient to clothe the plaintiffs with a valid authority, and the power of the testamentary trustees, it cannot be doubted that they received such authority under their appointment by the Supreme Court. It is familiar law that upon the death of an original trustee the trust devolves upon the Supreme Court, and it has jurisdiction to appoint new trustees to execute the trust (1 Rev. St. pp. 730, 734. §§ 71, 72; *Delaney* v. *McCormack*, 88 N. Y. 174; *Farrar* v. *McCue*, 89 N. Y. 139; *Mott* v. *Ackerman*, 92 N. Y. 539; *Cooke* v. *Platt*, 98 N. Y. 35; In re *Hawley*, 104 N. Y. 250, 10 N. E. Rep. 352; *Greenland* v. *Waddell*, 116 N. Y. 243, 22 N. E. Rep. 367).

The power of sale is by the will conferred upon the executors, or "whoever shall execute this my will;" and hence the power is not a personal trust or confidence, but it can be exercised by any person lawfully appointed to execute the will.

The plaintiffs, therefore, have power to convey the

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real estate in question, and can give a good title thereto, and the judgment should therefore be affirmed, with costs.

All concur.

Judgment affirmed.

POSEGATE *v.* SOUTH.

(46 Ohio State, 391.)

WILLS—CONSTRUCTION—EXECUTORS.

A testator bequeathed all his personal estate,, after the payment of his debts and funeral expenses, to his wife, and at her death "said personal estate, or so much as shall be unconsumed, to be equally divided between" his heirs, naming them. The wife survived the testator and accepted the provision made for her in the will. The executor paid the debts and funeral expenses, and delivered the balance of the personal estate to the widow, and settled his accounts accordingly. The will did not require or direct the executor to collect or distribute the personal estate that might be left unconsumed at the death of the widow, or enjoin upon him any duty with respect thereto. *Held*, (1) after the debts and funeral expenses were paid, the widow became entitled to the possession, use and enjoyment of the personal estate, with the right to consume the whole or any part of it; and it was the duty of the executor to deliver possession thereof to her. (2) When the executor performed that duty, he administered the estate and executed his trust, and cannot be held responsible for any use or disposition made by the widow of such personal estate after it so lawfully came to her possession; nor can he thereafter be required to account therefor in the Probate Court.

ERROR to the Circuit Court, Clinton County. On the 25th day of March, 1885, Benjamin F. South and Charles P. South filed their motion in the Probate Court of Clinton County for a citation against Isaac N. Posegate, executor of the last will and testament of Charles Posegate, deceased, to compel him to render an account. On the same day the executor appeared, and answered that on the 6th day of August, 1870, he made a final

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settlement of his trust in said court, on which settlement there was found to be then remaining in his hands a balance of $8,146, after the debts and expenses of administration were paid, which balance he then, in accordance with the last will and testament, turned over to Ann Posegate (the widow of the testator), who died in 1877, but who before her death consumed and disposed of the same, except enough to pay the expenses of her last sickness and funeral. This answer appears to have been treated by the Probate Court as an account, and Benjamin F. and Charles P. South filed exceptions to it; the ground of the exceptions being, as stated in the record, "that at the time of the death of Ann Posegate, to wit, April 29, 1877, said executor received and had in his hands as such executor the sum of eight thousand dollars, and that he still retains the same," and asked that he might be charged therewith, together with interest thereon. Upon the hearing the Probate Court proceeded to state an account for the executor, and found there was in his hands the sum of $482.85, which the executor was ordered to pay to Benjamin F. and Charles P. South in equal proportions. From this order of the Probate Court the two Souths took an appeal to the Court of Common Pleas, which, on the trial there, found that the estate of Charles Posegate had been fully settled, and distribution thereof made in conformity to the last will and testament, and rendered judgment against the appellants for costs. A bill of exceptions was taken, from which it appears that "the following state of facts was agreed upon by the parties, and given to the court as testimony: That Charles Posegate in the month of March, 1860, about the 19th day thereof, having four children, to wit, I. N. Posegate, Mary Ann Woodmansee, Martha McKibben, and Sallie South, made a will as to his personal estate, devising same to his wife, Ann Posegate, during her life, and at her death to be equally divided among the four children above named, and appointing I. N. Posegate executor of said will. Sallie South died April 4, 1861, leaving Charles P. South and Benjamin F.

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South her only children and heirs-at-law. Charles Posegate died July 17, 1869, leaving a widow, Ann Posegate, and the above-named I. N. Posegate, Mary Ann Woodmansee, Martha McKibben, and the above named children of Sallie South, his only heirs-at-law. Ann Posegate, died April 29, 1877. At the death of Charles Posegate, I. N. Posegate qualified as executor, and proceeded to settle his estate. After making full settlement, and paying all the liabilities of said estate of every kind, there remained in his hands the sum of $8,146.00 in money and notes, which he handed over to his mother, and she retained $746.00,—the money on hand,—and divided the rest between I. N. Posegate, Mary Ann Woodmansee, and Martha McKibben, giving to I. N. Posegate $3,800,— his one-fourth and Sallie's one-fourth,—and Mary Ann Woodmansee and Martha McKibben $1,800 each,— same being one-fourth to each,— for which they gave her their notes, and paid her interest on the same as long as she lived." It also appears from the bill of exceptions that, in the lifetime of the testator, Isaac N. Posegate, for a consideration of $600, purchased from Mrs. South her claim in the personal estate of her father, and took from her and her husband a receipt acknowledging such purchase and full payment therefor. The will of Charles Posegate, which was duly probated, and is made part of the bill of exceptions, omitting its merely formal parts, is as follows: "*First.* It is my will that all my just debts and expenses of my last sickness and funeral expenses be paid. *Second.* I give and devise to my beloved wife, Ann Posegate, in lieu of her dower, all my personal and chattel estate of every description that may be in my possession at the time of my death after paying my debts and funeral expenses. *Third.* At the death of my said wife the said personal estate, or so much as shall be unconsumed, to be equally divided between my lawful heirs, to wit, Isaac N. Posegate, Mary Ann Woodmansee, Martha McKibben, and Sarah Jane South. *Fourth.* I do hereby nominate and appoint Isaac N. Posegate executor of this, my last will and tes-

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tament, hereby authorizing and empowering him to compromise, adjust, release, and discharge in such manner as he may deem proper, the debts and claims due me." The Circuit Court reversed the judgment of the Court of Common Pleas on a petition in error prosecuted by Benjamin F. and Charles P. South, and the executor, Isaac N. Posegate, prosecutes error to this court, to obtain the reversal of the Circuit Court.

Telfair & Telfair, for plaintiff in error. *J. M. Kirk*, for defendants in error.

WILLIAMS, J. The questions chiefly argued in the case relate to the validity of the transfer by Mrs. South of her expectancy in the personal estate of her father, to her brother Isaac N. Posegate. The defendants in error contend that the attempted transfer is inoperative against them, because Mrs. South was, *first*, at the time, under the disability of coverture, and, *secondly*: her father being then living, her interest in his estate was incapable of transfer; and it is also claimed that Mrs. South having died before her father, her children, by force of the statute (section 5971, Rev. St.), took directly under the will, and not from her. Unless, however, at the death of the widow, it became the duty of the executor to collect and distribute the unconsumed personal estate given her by the will, an account thereof could not be enforced against him in the Probate Court; and whether such duty devolved upon the executor in the execution of his trust is naturally the first question demanding consideration.

No statutory election by the widow to take under the will of her deceased husband, is shown by the record. It discloses, however, that she actually accepted the provision made for her in the will, by receiving, using, and controlling the property bequeathed to her, as fully as she could if she had appeared in the probate court for that purpose, and declared her election, which is the equivalent of an election made in conformity to the statute. *Baxter* v. *Bowyer*, 19 Ohio

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St. 490. The bequest contained in the second item of the will is absolute, and, unaffected by any other provision of the will, would vest in the widow the unqualified ownership of the property bequeathed to her. If it be conceded that the third item, which, at her death, gives the personal estate, or so much thereof as shall be unconsumed, to the testator's children, so qualifies the previous bequest as to reduce the estate given by it to the widow to one for life, it must be also admitted that it is a life estate, with the right to the possession, use, enjoyment, and consumption of the property by her, without restriction, either upon the mode of its use and enjoyment, or the extent of its consumption; for it is only so much as shall remain unconsumed at the death of the widow that is given over to the children, and no limitation is found in the will upon the nature of the use to which she may subject the property, and her power to consume it is uncontrolled. Such right of use, enjoyment, and consumption necessarily implies the right to the possession of the property, since, without its possession, it could neither be used, enjoyed, nor consumed. The duty of the executor under the will, therefore, was, after the payment of the debts and funeral expenses of the testator, to deliver possession of the personal estate to the widow.

It may be that a court of equity would have compelled the widow to furnish the legatees of the remainder, an inventory of the property received by her from the executor, and that a proceeding might have been maintained by them against her to require security against its improper disposition, likely to defeat their estate in it. It has sometimes been held that equity will assist the donee in remainder, to whom a gift of personal property is made after the decease of another who is to have it only for life. And it may also be that no disposition which the widow could make of the property, otherwise than such as resulted from its use and consumption, would be effectual as against the children to whom the unconsumed remainder is bequeathed, and that a remedy is open to them to charge the person re-

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ceiving it under such unauthorized disposition, like that pursued in the case of *Huston* v. *Craighead*, 23 Ohio St. 198. But we are of the opinion no duty was imposed upon the executor to exact an inventory from the widow when he delivered the personal estate to her according to the requirement of the will, or to institute proceedings to protect the donees in remainder; nor is he responsible for any disposition made of the property by the widow after it lawfully came to her possession, or thereafter accountable for it in his representative capacity. It cannot be claimed that any express duty is enjoined by the will upon the executor, with respect to the estate in remainder. He is not required or directed to take charge of the unconsumed personalty, and divide it among the children. It is given by the will directly to them, to be equally divided among them. Upon this point the case is not distinguishable from *Flickinger* v. *Saum*, 40 Ohio St. 591. There the testator devised and bequeathed his real and personal estate, after the payment of his debts, to his wife for life, remainder to be equally divided between the heirs of his children. The executor paid the debts, and delivered the balance of the personal estate to the widow. It was held the executor had no remaining duty to perform, and that it was not his duty to divide the estate in remainder. It is said in the opinion by MARTIN, J., that after the executor paid the debts (there being no legacies to pay) "he had no right to retain the assets. The devise to the widow was of *all* the personal property, and was in its nature specific. The assent by the executor was a relinquishment of all claim to the property, and perfected the title of the widow and remaindermen." And see *Ratcliff* v. *Warner*, 32 Ohio St. 334.

In the case now under consideration, the bequest to the wife is of all the testator's personal estate. The debts and funeral expenses were paid by the executor. There were no legacies to be paid. The executor had no right to withhold from the widow the personal estate remaining in his hands, and nothing remained for him to do but deliver its possession to her, and

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settle his accounts. This, according to the agreed statement of facts contained in the bill of exceptions, the executor did; and we think the court of common pleas correctly held that the estate was finally settled and distributed in conformity to the will. As this conclusion is decisive of the case, we leave undecided the questions argued, concerning the validity and effect of the transfer by Mrs. South of her expectancy, and the rights of the defendants in error in the property. Those questions could not properly be determined in the proceeding prosecuted by them in the probate court, nor in any other which that court has jurisdiction to entertain.

Judgment of the circuit court reversed, and that of the common pleas affirmed.

EVANS *vs.* OPPERMAN.

(76 Texas, 293.)

SUBJECT OF BEQUEST—INSURANCE POLICIES—BENEFICIARIES—"PERSONAL PROPERTY"—COMMUNITY PROPERTY.

Life insurance policies were taken out by a husband payable to his wife, her administrators, executors, or assigns, and in the event of her death before him, then to their children. *Held:* That the title thereto did not pass to the husband under her will bequeathing to him all her "personal property" in certain houses, nor by a bequest of all her interest in the community property; and that the words "their children" in the policies embraced only children common to them both.

APPEAL from a judgment of the District Court of Galveston County. The facts appear in the opinion.

McManus & Wilson, for appellants.

Wheeler & Rhodes and *Donaldson & Minor*, for appellee.

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GAINES, J. The appellants are the children of Gustave Opperman by his first wife, and appellee is his only child by his second. During the life of his first wife, Mary A. Opperman, Gustave Opperman took out three policies of insurance upon his life,—one for $10,000, one for $5,000, and the third for $4,520. The first and third were made payable, upon the death of the assured, to his wife, Mary A. Opperman, and provided that, in the event that she died before her husband, the money should be paid to their children. The second policy was made payable, upon the death of the assured, to "Mary A. Opperman, her executors, administrators, or assigns." Mary A. Opperman died before her husband, having made a will in which she made to him certain bequests and devises, and also bequeathed and devised to him all her interest in their community property. Gustave Opperman then married a second time, and afterwards died, leaving a will by which he devised to his second wife certain specific property, and gave all the residue of his estate to his children by his first wife. The appellee was born after his death. The money due upon the three policies of insurance was paid to the children of the first marriage. This suit was brought by the child of the second marriage against his half brothers and sisters, claiming an equal interest with them in each of the policies of insurance, and seeking to recover that interest.

There was a demurrer interposed to the petition, and it was overruled by the court. This action of the court presents a question we have found it difficult to determine. From the face of the petition, it would seem that the ground of complaint is that the defendants had collected the whole of the insurance money, and that the plaintiff is entitled to an equal share, namely, one-tenth of it. Admitting all this to be true, it is not clear that any money has been due to the plaintiff. If he was entitled to a part of the money, the insurance companies still owe it to him, and the action of the defendants has not deprived him of any right. If they had held the legal title to the money,

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and he had owned a beneficial interest in it, his right to sue them would have been clear. But, in the absence of any fiduciary relation, or any privity of contract, between the parties, and of the deprivation of any right which he had, it is difficult to see that he has a cause of action against them, according to the facts stated in the petition. It is alleged that they converted the policies, and the money due thereon, to their own use. This means, we presume, that they collected the money, and may be intended to mean that they delivered the policies to the companies that issued them. If the right of the parties had been to a specific fund or sum of money, and the defendants had appropriated the whole, the plaintiff being entitled to a part, he would have had a right of action against them. But the claim here was merely for debts owed by the insurance companies. We have examined many cases in which suits were brought for money had and received, and have found none that would warrant this action. Whether the conversion of the evidence of debt by one or more creditors will give a right of action to another creditor, having a common interest in a chose in action, we need not determine. We are of the opinion that, under the facts disclosed by the testimony, the plaintiff has a right of action for a part of the money which he claims; and, since we have determined to reverse the case upon another ground, he will have an opportunity to amend his petition so, at least, as to obviate the present difficulty.

We deem it necessary to determine but one question presented by appellant's assignments of error. The decision of that question, in our opinion, requires a reversal of the judgment, and, so far as we can now see, will be a sufficient guide to enable the court below to make a correct disposition of the cause upon a new trial. The court held that by the will of Mary A. Opperman the title to the $5,000 policy passed to her husband, and that upon his death the money accruing thereon belonged to his children; each taking an equal share. So much of that will as relates to this question is as follows:

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"I, Mary Ann Opperman, wife of Gustave Opperman, of Galveston, being of lawful age, and of sound mind and memory, wishing that my husband may enjoy the property which he has acquired during our marriage, and also that which he has, out of affection for me, donated to me by deed, do make, ordain, and publish this, my last will and testament.

Item First. I give and bequeath unto my said husband, Gustave Opperman, the seven lots on which we now live, being lots one (1) to seven (7), both inclusive, in block 552 in the city of Galveston, the dwelling house, and all other improvements on said seven lots, also all the personal property belonging to me by gift from him, or otherwise, in said dwelling house, and in all other buildings on said lots; also, I give and bequeath to my said husband certain other real estate; and also I give and bequeath to my said husband all my interest in the community property acquired by us during our marriage, trusting to him to make proper provision for our children.

We think it clear that the right of the testatrix to the policy did not pass by that clause which bequeathed to her husband all the personal property in the dwelling house and other buildings on the lots devised. That, in our opinion, was intended to embrace only tangible property, and probably applied mainly to the household and kitchen furniture, and other articles used in connection with the residence, for the comfort of the family. Did, then, the title to the policy of insurance pass by the bequest of the interest of the testatrix in the community property? If the policy was the common property of the husband and wife, it did; but, if it was the separate property of the wife, it did not.

It is well settled that the husband may make a gift to the wife of the community property, so as to make it her separate estate. *Story* v. *Marshall*, 24 Tex. 305; *Reynolds* v. *Lansford*, 16 Tex. 286; *Smith* v. *Boquet*, 27 Tex. 507. In the case first cited, in speaking of a deed from the husband to the wife, Chief Justice WHEELER

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says: "In the absence of any evidence of intention outside of the deed, it must be taken as evidencing the intention which upon its face it imports; that is, to convey to the wife the estate of the husband in the property. * * * To deny it that effect would be to render the whole deed inoperative and void." We think it equally manifest that when a husband insures his life, and makes the policy payable to his wife, his intention is that the policy shall inure to her separate use and benefit. By the terms of the contract, the money is not payable until the husband is dead, and the marital relation has been dissolved. It is clear that the policy in question was the separate property of Mrs. Mary A. Opperman, and that it did not pass to the husband by that clause in her will which conveyed to him her interest in their community estate. The mention in the will of certain parcels of separate property, and of her interest in all the community property, excludes the idea that any separate property not mentioned was intended to be conveyed. The recitals in the will tend to show that it was the intention of the testatrix to devise and bequeath to her husband all her property which she had acquired through him. But we understand the rule to be that when the construction is doubtful, the reasons given for a devise may be looked to in order to solve the doubt, but that, when the meaning of the language of the devise is clear, it cannot be controlled by the reason assigned for making it.

It has been held that the reason "cannot warrant the rejection of words that are clear" (1 Jarm. Wills, 483); and the same principle precludes us from adding to a bequest property not embraced by unambiguous words of description, although the reason assigned for making the will may indicate that it was the intention that such property should be included. On the other hand, counsel for appellants go the length of insisting that Mrs. Opperman took only a life estate in the policy, and that she had no power to convey it by will. We do not concur in that construction. The case cited by them does not support their position. *Bailey* v. *In-*

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surance Co., 114 Mass. 177; s. c. 19 Am. Rep. 329. It is there merely held that a policy payable to the executor or administrator of the assured, for the benefit of his wife, must be sued upon by such legal representatives. The words "her executors, administrators, or assigns," in the policy under consideration, are, as we think, descriptive of the estate taken by the beneficiary under the policy, and show that she took an absolute title to it.

The court below held that upon the death of Mrs. Opperman the title to the policy passed to her husband, and that upon his death the money due upon it belonged to his children in equal portions, and, having found that the children of the first marriage had received the whole, gave judgment in favor of appellee, the child of the second wife, against each of them, for one-tenth of the sum so received by each. This, we think, was error.

It does not follow, however, that upon the facts proved the appellee was not entitled to recover something. Upon the death of the first wife, the policy descended to her heirs; that is to say, one-third descended to her husband, and the other two-thirds to her nine children, who are the appellants here. Rev. St. art. 1646. The husband made a will in which he made certain devises and bequests to his second wife, and devised and bequeathed the residue of his estate to his children by his first wife. The appellee, as his posthumous child, became entitled to such interest in his father's estate as he would have taken had no will been made. Rev. St. art. 4867. The testimony showed, upon the trial, that administration was taken out upon the estate of Mrs. Mary A. Opperman, the first wife, and that the administrator collected the money due upon the policy and paid it to his children. The evidence wholly fails to support the allegation of the petition that appellants converted the policy. They received what they were entitled to receive according to the letter of their father's will. Under the statute above cited, appellee succeeded to

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the portion of his father's estate he would have received had the father died intestate; and, to raise this portion, all the devisees and legatees were required to contribute proportionably out of the parts devised and bequeathed to them by the will. Rev. St. art 4867. The rights of the appellee in the policy of insurance under consideration grew out of the statute referred to, and must be enforced according to its provisions. What they may be as against appellants, must depend greatly upon the partition and distribution that has been made of the other property belonging to his father's estate. If he has received his share of the remainder of the estate, and if each devisee has contributed his proportion to make up that share, and if the policy in question has not been accounted for in the settlement, should not his mother, as a devisee, contribute towards making up the amount due him out of this fund? But, not knowing what has been done with reference to the other property of the estate, it is needless to speculate upon such conjectures as may suggest themselves. Having shown that the uncontroverted evidence in the case discloses that his father had but a third interest in the policy for $5,000, it is apparent that the judgment is excessive, and must be reversed. His remedy is to so amend his petition as to make it an action to recover against the legatees under his father's will the interest which the statute gives him as a posthumous child.

The appellee has filed cross-assignments of error, which we shall now proceed to consider. He complains the court should have allowed interest on the amount adjudged to him for the time the appellant received the money on the policy. With reference to this, we deem it sufficient to say that, if, upon another trial, appellee should be found entitled to recover any part of the money received by appellants on the policy, he should also recover interest from the time it was so received.

Whatever judgment is rendered should be against each of appellants, separately, for the part of the money

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wrongfully received by him, and not against all, jointly, for the whole.

Appellee further insists that the court erred in holding that he was entitled to no part of the money received by appellants on the policies for $10,000, and $4,520, respectively. As before stated, these policies were payable to Mary A. Opperman, the wife of the assured, and, in the event she died before her husband, then to "their children." It is contended that "their children" meant not only the children common both to the insured and to his wife, but also the children of either of them, and that therefore appellee was included. We do not assent to the proposition. It may be that, by an inaccurate use of the words, they may be sometimes employed in the sense contended for by appellee, and that, under peculiar circumstances, as in the case of *Stegler* v. *Stegler*, 77 Va. 163, to which counsel refer, they were properly construed to have that meaning. We think, however, the obvious and more accurate meaning of the term is the children of both the persons referred to. They could not have been intended to include any other children of the wife, because she could only have married again after the death of the husband, and after the policy had become her absolute property. If the husband had intended to embrace any child or children he may have had by a second wife, his meaning would have been clearly and accurately conveyed by providing that if his wife died first the policy should be payable to his children. By the use of the term "their children," we think, was meant the children common to both husband and wife, and that, under the two policies now under consideration, appellee was entitled to take nothing.

For the error of the court in giving judgment against the appellants under the petition and evidence, and because the judgment, in any event, is too large, the judgment is reversed, and the cause remanded.

Reversed and remanded.

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WADDINGTON *vs.* BUZBY.

(45 New Jersey Equity, 173.)

TESTAMENTARY CAPACITY—RELATIONSHIP OF DRAUGHTSMAN.

A person who is aged, infirm, and almost blind may make a valid will if capable of recollecting the property she is about to dispose of, understanding the manner of distributing as therein set forth, knowing the objects of her bounty, and the nature of the business in which she is engaged.

The facts that the draughtsman of the will is executor, and his wife and son are favored legatees, while they call for suspicious scrutiny, will not invalidate the will, without some more certain evidence appearing of fraud or undue influence. Each case must be adjudged by its own circumstances, and no general rule can be made applicable to all cases.

APPEAL from the prerogative court; MCGILL, Ordinary.

W. T. Hilliard, and *W. E. Potter*, for appellant.

C. H. Sinnickson, for respondent.

SCUDDER, J. A careful consideration of the facts in this case has changed my first impression, and led me to a different result from that reached in the courts which have made the prior examinations of the questions presented. It appears, in my judgment, that sufficient weight has not been given to the extent or the right which the law gives to the owners of property to dispose of it by will, the moderate capacity required for the exercise of this right, and the aid they may invoke from others in giving order and legal form to their wishes without subjecting them to the charge of fraud and undue influence.

At the date of this writing and its execution, April 20, 1882, Ruth W. Buzby was about 83 years old, and she died in 1886. She was feeble and forgetful to the extent that persons ordinarily are at such an advanced age, and she was nearly blind, so that she could not read, or did so with difficulty. But she could at that

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time go about the house, knew the members of the family, talked about her business affairs, remembered the amount of her property, and where it was invested, objected to the reduction of the percentage of interest, took a part in the routine of the house, and the payment of bills, and conversed with visitors whom she knew. She had been an intelligent woman, but not of very strong will, rather reticent than talkative, and became more silent and absent-minded as she grew old. She was injured by a fall, and failed in physical and mental strength from that time gradually until her death. The opinions of witnesses as to her mental capacity are of no weight unless sustained by facts on which such opinions are founded; and those who saw her seldom, or but once, and say she was silent, and appeared absent-minded, give little aid in determining this question. *Love* v. *Williamson*, 2 N. J. Eq. 82; *Sloan* v. *Maxwell*, 3 N. J. Eq. 581; *Whitenack* v. *Stryker*, 2 N. J. Eq. 8; *Andress* v. *Weller*, 3 N. J. Eq. 605; *Stackhouse* v. *Horton*, 15 N. J. Eq. 202; *Pancoast* v. *Graham*, 15 N. J. Eq. 294; *Stevens* v. *Van Cleve*, 4 Wash. C. C. 262; *Den* v. *Van Cleve*, 5 N. J. Law, 589; *Harrison* v. *Rowan*, 3 Wash. C. C. 580; *Turner* v. *Cheesman*, 15 N. J. Eq. 243; *Eddy's Case*, 32 N. J. Eq. 701, 33 N. J. Eq. 574; *Collins* v. *Osborn*, 34 N. J. Eq. 511; and others that might be cited—are cases in our State where persons who were aged, diseased, blind, and infirm have executed wills, and the rule of capacity by which they may be sustained has been enunciated.

It is shown to my satisfaction that the testatrix, at the time she executed this writing, was capable of recollecting the property she was about to dispose of, understanding the manner of distributing it therein set forth, the objects of her bounty, and the nature of the business in which she was engaged. If so, she had the requisite testamentary capacity. The paper was in fact executed by her as her last will and testament, in the presence of two witnesses present at her house at the same time. The attesting clause does not say that they signed in the presence of the testatrix. One

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of these subscribing witnesses is dead; the other is living, but does not remember the circumstances. He is certain as to his signature, and that of the other witness is proved by his son. It is shown by the testimony of the other two persons who were present at the signing of the paper that they were all together in the dining-room when she signed and requested them to sign as witnesses to her will. This completes the attestation. It also appears that the will was read to her before signing. She took the will after execution, herself, upstairs, put it in a box with her other papers in a drawer of her room where she slept, and it remained in her possession until her death, about five years after its date. Of the fact of its due execution, and her capacity to make it, there seems to me to be satisfactory proof offered.

The more serious question in the case is whether Ruth W. Buzby executed this writing, purporting to be her last will and testament, through the undue influence of George G. Waddington, the proponent. The influence that will vitiate a will must be such as in some degree destroys the free agency of the testator, and constrains him to do what is against his will, but what he is unable to refuse, or too weak to resist. 1 Jarm. Wills. *37; *Lynch* v. *Clements*, 24 N. J. Eq. 431; *Moore* v. *Blauvelt*, 15 N. J. Eq. 367.

It is claimed that this appears in several particulars The proponent wrote the will in which he was made sole executor, and his son and wife were favored legatees. In *Rusling* v. *Rusling*, 35 N. J. Eq. 120, 36 N. J. Eq. 603, it was said that the fact that the will was drawn by a favored legatee, while it calls for suspicious scrutiny of the circumstances, does not, of itself, invalidate the will. The same rule would apply where the legacies were given, not to himself, but to those who stand in such near relationship to him as a son and wife. We must therefore look for other circumstances. Each case must be judged by its own circumstances, and no general rule can be made applicable to all cases.

The testatrix had three children—Mary Buzby, Beu-

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lah Gaskill, and Nathan Buzby. The son had died some years before her death, leaving a son of the same name, who is the *caveator* against the probate of this will. Mary Buzby lived with her mother until she died, on March 29, 1882. She cared for her in their home, aided her in the management of her property, but there is no evidence that she exercised undue influence over her. Her entire property was the sum of $5,200 invested in bonds and mortgages, and some household furniture of no great value. Some years before her death she made a will by which she bequeathed $1,200 to Beulah Gaskill, and the residue to Mary Busby. This will was drawn by Aaron Fogg, a neighbor. On the evening before Mary died, a codicil was written by Aaron Fogg to this will. He went to the testatrix's house, at the request of the proponent, and it was there executed by Ruth W. Buzby and witnessed by him and his daughter, who went with him for that purpose. The exact form of the codicil is not given, but it was for the benefit of Mary B. Waddington, the proponent's wife, who is the daughter of Beulah Gaskill, and granddaughter of Ruth W. Buzby. She was taken by the testatrix when an infant, named after her daughter, Mary, brought up by them with care and affection, and remained with them until her marriage. By the will in controversy $1,500 is given to Beulah Gaskill, and some furniture; $100 to Ann B. Gaskill, and some silver-ware; $100 to Isabella P. Gaskill, and some silver-ware; $600 to Asher B. Waddington, her great-grandson; $600 to Martha Hancock, in lieu of any charge for services or otherwise she might make against her estate; and the residue to Mary B. Waddington, her granddaughter.

Her reason for giving no legacy to her grandson Nathan W. Buzby, the *caveator*, is stated in her will in these words:

"My grandson, Nathan W. Buzby, heired a legacy for one thousand dollars by the will of his grandfather, Asher Buzby. By the failure of my co-executor, George W. Ward, I have been compelled to pay the

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greater part of said legacy out of my own resources, and this is the reason my said grandson, Nathan W. Buzby, is not mentioned as a legatee in this instrument."

This payment was demanded of her by her grandson when it was said that she had but $10 left in the house for their present support; and there is evidence that, although she was patient at the time, and afterwards treated him with kindness and affection, she was displeased with his demand for the money, and his extravagance in spending it after he had received it.

Beulah Gaskill went to live with her mother after Mary's death, and remained with her until her death, with the promise that she would be provided for. She also received $1,500 by the will of her sister Mary. From this disposition of the property it will appear that all, excepting $600 given to Martha Hancock for services in the family from the time she was a child, was bequeathed to Beulah Gaskill and her children; Mary B. Waddington and her son, Asher, namesake of his grandfather, receiving the greater portion of the estate. The exclusion of Nathan W. Buzby was in the former will drawn by Aaron Fogg, with which Waddington had no connection, and Beulah Gaskill's individual portion was largely increased after the death of her sister Mary by her will and by the terms of this will, though in these proceedings she is hostile to the proponent.

These dispositions appear more like the natural operation of the mind and affection of the testatrix than results of the fraudulent contrivance or undue influence of Waddington, who wrote this will. His conduct, his character, and relationship to her do not warrant such charges against him without more direct and certain evidence. Until about the time of Mary's death it does not appear that he took any interest in her business. He lived at Elsinboro, two and a half miles from the testatrix's home in Salem. After Mary's death, he attended to her money matters, collected her interest, and deposited it for her, advised the investment of

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her money when the security was changed, and with her consent re-invested it for the best rate of interest she could obtain. He was the husband of her granddaughter, and apparently the nearest connection with whom she could advise, and on whose judgment she could rely, as the infirmities of age increased. While it would have been more delicate and prudent for him, under the circumstances, to secure the services of a stranger to prepare a will for the testatrix, yet, if she had sufficient capacity to make it, and this is the voluntary expression of her wishes in disposing of her property, his mistake or even officiousness in tendering his services should not be allowed to defeat her purpose, long entertained and expressed in a former will, to exclude the *caveator* from any portion in her property. The decree should be reversed, and the will admitted to probate.

Under the peculiar circumstances of this case the *caveator* will be allowed $250 in lieu of costs, expenses, and allowances in all courts; and the executor will be given his costs and expenses out of this estate.

Decree reversed.

Testamentary capacity—When the testator is aged, or infirm, or partially or entirely blind—Absent-mindedness or feeble-mindedness.— In Lowe v. Williamson, 1 Gr. Ch. 82, cited in the principal case, three grounds were taken against the will: First, incapacity; second, that the testator had a delusion of mind as to his family; and, third, that improper influence was exercised in its procurement. Speaking to the point of delusion of mind the court said:

"It was further urged that the testator was under a species of derangement or delusion as to his relatives; that he took up a prejudice without cause. I have before said that I find no good reason for this hostility, but it is plain that the testator had such feelings toward them. There was no intimacy with them. They visited him very little. He had an idea that they looked down upon him and was no doubt jealous of their superior standing. There was, then, no delusion but a reality, in fact, that there existed no cordiality between him and his relatives. It was of long standing, not sudden and accidental, but abiding. Upon the whole case I am constrained to say that I see no good ground for refusing the probate of this will."

In the case of Whitenack v. Stryker, 1 Gr. Ch. 82, the court held that the findings of a commission of lunacy were not conclusive upon the question of testamentary capacity, and that where the testator

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had been found by such a commission at two different times before his death to be a lunatic, enjoying lucid intervals, and to be of unsound mind and mentally incapable of managing his affairs, the court would still consider the question of testamentary capacity on its merits and would find for or against the will upon the evidence.

The court, in speaking of the findings of the commission of lunacy, said:

"These inquests are not pretended to be conclusive on the case, but it is claimed for them that they are entitled to all that respect which is due to the opinions thus expressed of so large a number of the most respectable citizens of the County of Somerset. This is perfectly correct. They are entitled to all the respect which any man, acting on the subject before them, could possibly have. Some of the jurors I know, and I respect no man among us more. Their business and mine is very different. They have decided from the general character of the testator that he was incompetent to manage his business. It is my duty to decide whether, at the times he executed two instruments of writing, he was of sound mind. With the first inquisition I am fully agreed, that the testator had lucid intervals. I should have very little doubt that these very jurors would one and all, upon this evidence, agree with me that this testator was at times disordered during the last years of life, and at times perfectly rational."

In Sloan v. Maxwell, 2 Gr. Ch. 563, it was held that there was no distinction in the degree of mental capacity requisite for the execution of a will of real estate and that requisite for the execution of a will of personal estate. And there is an elaborate discussion in the learned opinion of the ordinary of the meaning of the phrase "sound mind," many of the earlier English cases being cited.

A well approved definition of a sound and disposing memory was that given by Judge Washington in Den v. Van Cleve, 4 Wash. C. C. Rep. 267, as follows:

"Was he capable of recollecting the property he was about to bequeath, or manner of distributing it and the objects of his bounty?"

The most satisfactory test of testamentary capacity is the capability to transact business with sagacity and decision. Turner v. Hand, 3 Wall, Jr., 88; Harrison v. Rowan, 3 Wash. C. C. 585; Lynch v. Clements, 9 C. E. Gr. 431. See, also, Nelson v. McGifford, 3 Barb. Ch. 158; Redfield's Am. L. C. 29 and 30; Stewart v. Lispenard, 26 Wend. 25; Thompson v. Keyser, 65 Penn. St. 368; Dunham's App. 27, Conn. 192; Baldwin v. Parker, 99 Mass. 79; Marshall v. Flinn, 4 Jones (N. C.) 199.

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McCORMICK *vs.* McELLIGOTT.

(127 Pennsylvania State, 230.)

CONSTRUCTION—DURATION OF ESTATE.

Testator gave his wife a life-estate in all his property. After some other provisions he gave the residue to his daughter, H., her heirs and assigns. In case she should die without child or children, his estate was to go to his brothers and sisters. The income of a sum of money was to be set apart after the death of the wife, for a son of testator; and, in case he should die without issue, or leaving issue who should not reach the age of 21 years, the principal was to go absolutely to H. *Held*, that the words, "die without child or children," in the residuary devise to H., meant her death without issue during the life of her mother, the taker of the life-estate; and, having survived her mother, her estate was absolute.

ERROR to Court of Common Pleas, Lancaster County; J. B. LIVINGSTON, Judge. Case stated, in which Hannah McElligott sues D. R. McCormick for failure to comply with an agreement to purchase land from plaintiff. Judgment for plaintiff, and defendant brings error. The following opinion was filed by the Trial Court:

"LIVINGSTON, P. J. From the case stated, it appears that Jeremiah McElligott, of the city of Lancaster, died on November 11, 1875, leaving to survive him a widow, Anna McElligott, and two children, Hannah McElligott, the plaintiff above named, and Thomas F. McElligott, and also a brother Daniel McElligott, and two sisters, Honora McElroy, and Mary Studdard, after having made his last will and testament, dated August 17, 1875, duly proven, wherein and whereby he devised and bequeathed *inter alia* as follows, to wit:

"FIRST. I direct all my just debts and funeral expenses to be paid and satisfied by my executrix hereinafter named, as soon as conveniently may be after my decease.

"ITEM. I give, devise, and bequeath unto my beloved wife, Anna, for and during her natural life, all my property, real, personal, and mixed, of what nature and kind soever, and wheresoever the same shall be at the time of my death.

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"ITEM. After the death of my wife, Anna, I give and bequeath unto my friend, Daniel A. Altick, five thousand dollars in trust, the interest thereof annually to be paid to my son Thomas for and during his natural life.

"ITEM. After the death of my son, Thomas, it is my will, and I direct, the said sum of five thousand dollars to remain in the hands of said Daniel A. Altick until the child or children of Thomas shall arrive at the age of twenty-one years, when the same shall be equally divided among such child or children; and, in case the child or children of my said son, Thomas, shall die before arriving at the age of twenty-one years, then, and in that case, I order and direct that the said sum of five thousand dollars be paid to my daughter Hannah, or her heirs and assigns.

"ITEM. The rest, residue, and remainder of my estate, real, personal, and mixed, after the death of my said wife, Anna, I give, devise, and bequeath to my said daughter, Hannah, her heirs and assigns.

"Item. In case my said daughter, Hannah, should die without child or children, then it is my will, and I order and direct that my estate be equally divided between my brother, Daniel McElligott, of the city of Lancaster, and my sisters, Honora McElroy, wife of Peter McElroy, of the city of Brooklyn, in the State of New York, and Mary Studdard, wife of John Studdard, of the city of St. Louis, in the State of Missouri, and their heirs and assigns, share and share alike."

Anna McElligott, the widow, died in the year 1882. The daughter, Hannah McElligott, on December 7, 1888, entered into articles of agreement, with the said D. R. McCormick, for the sale of a portion of the real estate, being a lot of ground situate on the east side of Water street (No. 47), in the city of Lancaster * * * * and in said articles, the said Hannah McElligott did covenant and agree to make, execute, and deliver to the said D. R. McCormick a good and sufficient deed for the proper conveying and assuring of the above-described premises in fee-simple, and free from all incumbrances,

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* * * * of such deed as shown by the agreement. In pursuance of the terms of the contract, said Hannah McElligott had executed and on December 8, 1888, tendered, a deed of conveyance to said D. R. McCormick, and demanded payment of the purchase money, but the said D. R. McCormick refused to accept said deed, and to pay said purchase money, alleging that she, Hannah McElligott could not convey an indefeasible title in fee-simple to him, the said D. R. McCormick, his heirs and assigns.

If the court be of opinion that the said HannahMcElligott is so seized of the above-described premises as that she can convey an indefeasible title in fee-simple, in execution of said agreement, to the said D. R. McCormick, his heirs and assigns, free and discharged of all trusts of any kind, then judgment to be entered for the plaintiff for the sum of nine hundred dollars, with stay of execution to April 1, 1889; but if not, then judgment to be entered for the defendant. On January 19, 1889, the court, LIVINGSTON, P. J., filed an opinion therein, after discussing the different provisions of the will, and citing and considering Smith's Appeal, 23 Pa. St. 9; *Manderson* v. *Lukens*, Id. 31; *Rewalt* v. *Ulrich*, Id. 388; *Letchworth's* Appeal, 30 Pa. St. 175; *Burd* v. *Burd*, 40 Pa. St. 182; *Womrath* v. *McCormick*, 51 Pa. St. 504; *Eahrney* v. *Holsinger*, 65 Pa. St. 388; *Bradon* v. *Cannon*, 1 Grant, Cas. 60. *Middleswarth* v. *Blackmore*, 74 Pa. St. 414; *Caldwell* v. *Skilton*, 13 Pa. St.152; Estate of Biddle, 28 Pa. St. 59; *Fulton* v. *Fulton*, 2 Grant Cas. 28; Mickley's Appeal, 92 Pa. St. 514; Fitzwater's Appeal, 94 Pa. St. 141. *Lewin* v. *Killey*, L. R. 13 App. C. 783, the court concluded:

In the will before us, Hannah McElligott was the daughter, only daughter of the testator, and therefore by nature, as well as first taker, principal object of his bounty. He devises her an absolute estate, and to us it appears that he did not intend she should have a less or restricted estate in case she was living at the death of his wife, who had a life interest in it, the time when the devise to her would become operative. There is no unequivocal intent shown in the will that he meant

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that she should take a less estate, but rather that there should be no restriction; for, on the happening of a certain contingency, he gives her absolutely the $5,000 set apart in trust for his son.

The law favoring an absolute, rather than a defeasible, estate; a vested, rather than a contingent, estate, we are of opinion that the proper construction of the will before us is that the testator meant and intended that his daughter, Hannah, should take and have an absolute estate in fee-simple in the property devised to her, provided she was living at the time of the decease of his wife, the first taker, to whom he had given a life interest therein. And that, having been alive at the death of the widow, the termination of the particular or life estate, she took and now holds an absolute estate in fee-simple in the property devised to her; and having and holding such absolute and indefeasible title, being so seized in the premises described in the contract or agreement made part of this case stated, she can convey the same in fee-simple, free and discharged from all apparent trusts, or trusts contained in the will of the testator, or elsewhere. And we therefore, in pursuance of the requirements of the case stated, now enter judgment for the plaintiff for the sum of nine hundred dollars ($900), with stay of execution until April 1, 1889."

The defendant thereupon took this writ, specifying that the court erred:

1. In deciding that Hannah McElligott took an absolute indefeasible estate in fee-simple under the will of her father.

2. In not deciding that there was an executory devise over, in case Hannah should die without child or children.

3. In entering judgment for the plaintiff on the case stated.

Mr. Wm. R. Brinton, for plaintiff in error.

Mr. Atlee and *Mr. Coyle*, for defendant in error, were not heard.

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PER CURIAM. Notwithstanding the able and ingenious argument of the learned counsel for plaintiff in error, we are not convinced that the will of Jeremiah McElligott was erroneously construed by the court below.

After giving all his estate, real, personal, and mixed, to his wife for life, and creating a trust as to $5,000, to take effect at her death, in favor of his son, Thomas, for life, etc., the testator devised and bequeathed "the rest, residue, and remainder" of his estate remaining after the death of his widow to his "daughter, Hannah, her heirs and assigns." In the next clause of the will he orders and directs, in case his "said daughter, Hannah, should die without child or children," that his estate be equally divided between his brother and sisters. The devisee, Hannah McElligott, having come into possession of the residuary estate after the death of her mother, contracted to sell and convey a portion thereof in fee to defendant below. She accordingly executed and tendered him a deed, in due form, for the lot referred to in the case stated, but he refused to accept it and pay the consideration money, on the ground that, under the provisions of the will, she was not seized of an indefeasible estate of inheritance, and was therefore unable to convey such title as he had a right to demand. The learned judge of the Common Pleas, however, held that the testator intended to give his daughter, Hannah, an absolute estate in fee-simple in the property devised to her, provided she survived her mother, to whom he had given a life-estate therein; that, being so seized of an indefeasible estate, her deed to defendant below would, under the facts embodied in the case stated, give him a good title in fee, clear of all incumbrances; and he therefore entered judgment on the case stated in her favor. In this we think he was clearly right, for reasons given at length in his opinion sent up with the record. The words "should die without child or children," were evidently intended to mean, die without child or children during the lifetime of testator's widow. This construction accords with the weight of

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authority. Neither of the specifications of error is sustained.

Judgment affirmed.

AKIN *vs.* KELLOGG.

(119 New York, 441.)

WIDOW'S ELECTION—LIMITATIONS.

Where a widow, for more than one year after her husband's death, fails to make her election between a testamentary provision and dower, equity cannot relieve her from the statutory presumption that she has elected to take under the will (Rev. St. N. Y., 7th Ed. p. 2198, § 14), because she acted in ignorance of the nature and extent of the estate, and relied upon the representations of testator's confidential agent and adviser, who was familiar with the estate, but who was also the husband and agent of testator's daughter, out of whose lands plaintiff would be dowable. The act is a statute of limitations, and the policy of the law forbids the granting of relief against its provisions.

Under such circumstances, representations by testator's agent and adviser of matters of opinion, probability, possibility or conjecture, even if made in the presence of his wife, cannot operate as an estoppel to prevent her from pleading the statutory presumption of election against plaintiff's claim.

APPEAL from Supreme Court, General Term, third department. Action by Alletta A. Aikin against Sarah A. Kellogg, and Asa B. Kellogg, asking equitable relief from the presumption of having elected to take under her husband's will in lieu of dower, arising by the provisions of the statute (Rev. St. N. Y. 7th ed. p. 2198, § 14) from her failure to signify her election for more than one year after her husband's death. There was judgment for defendants, which was affirmed by the general term, and plaintiff again appeals.

Mathew Hale and *Ward & Cameron*, for appellant.

L. Laflin Kellogg, for respondents.

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GRAY, J. The complainant is the widow of Benjamin Aikin, deceased, who in his will made certain provisions for her out of his estate, which were expressed to be in lieu of her dower rights. They gave to her one-third of the personalty absolutely, and the net income of one-third of the real estate, which was vested in a trustee for that purpose during her life. She did not commence any proceedings or take any step towards a recovery or assignment of her dower in the real estate within the year succeeding the testator's death; and this action was commenced by her some three years afterwards. Through it she seeks to obtain a decree relieving her "from the penalty imposed by statute for not having within one year after the death of her husband, entered on the land to be assigned to her for her dower, or commenced proceedings for the recovery or assignment thereof," and permitting her to make her election, and to renounce the testamentary provision. The allegations in the complaint are that plaintiff was ignorant of the nature and extent of the estate of said Benjamin Aikin at the time of his death, and for a long time thereafter, and until his executor filed his accounts, and asked for a final settlement; that Asa B. Kellogg, the husband of the defendant, Sarah A. Kellogg, had been for many years prior to the death of the said Benjamin Aikin the agent and confidential adviser of said Benjamin Aikin, and had transacted all his business for him, and had been familiar with the affairs and property of the said Benjamin Aikin; that after the death of the said Benjamin Aikin this plaintiff had great confidence in the said Asa B. Kellogg, and put entire faith in his representations; that the said Asa B. Kellogg was also the agent of his wife; that, shortly after the death of the said Benjamin Aikin, he stated and represented to plaintiff that it would be more advantageous to her to accept the provisions of the will than to claim her dower in the real estate left by him, and that such representations were made to plaintiff in the presence of his wife, acting as her agent, and for her benefit. She avers that the statements

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were made for the benefit of Mrs. Kellogg, the owner of the lands out of which the dower is sought, and that by them she was induced to omit and neglect to take steps towards a renunciation of the testamentary provisions, and towards securing her dower interest in the real estate, which she would have taken had she not relied upon them, or had she been informed of the actual condition of the estate.

I think, even if we assume the truth of these charges of her complaint, that her right to relief in equity is most doubtful. She does not ask for relief against some positive act of her commission, procured by the fraud of another. She asks for it because, through reliance upon the statements of others, she remained inactive, and thus suffered the period of time to expire within which she should have been diligent to ascertain and to secure her rights.

Now, equity does not interfere to grant relief when one has failed in diligence, or in the performance of an obvious and imperative duty imposed by law. It does not rise above the common law and the statute. Its office is not to relieve against a hardship merely as such nor should its interference be moved by mere opinion in the judge. I do not think the equitable powers of a court can be properly invoked to interfere with the established rules of law, though the same result may be often reached by an injured party in preventing another from benefiting by an act or contract procured by his artifice or deceit. The theory of estoppel might be available in some such case. Here the complainant was apprised by the will of an option offered to her with reference to her future property rights; and it became at once her legal duty to be diligent and careful in acting if she proposed to take what the law assured to her in place of what the will gave. The Revised Statutes have but followed the common law in their provision for an election by the widow between a testamentary gift in lieu of dower and the dower right itself. But they have further provided that the widow shall be deemed to have elected her devise or pecuniary provision, unless,

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within one year after the death of her husband, she shall enter upon the lands to be assigned to her for her dower or commence proceedings for the recovery or assignment thereof. Where, then, a provision is by the express terms of the will made in lieu of dower, the widow is obliged to make an election whether to accept or to renounce it for what the law gives to her. She cannot have both, and she is at once chargeable with the duty of informing herself, so as to make her election And, that she shall have a certain period of time for that purpose, the legislature has provided what was deemed a reasonable season of delay; and its enactment that the election must be made within one year has the same force as a statute of limitation upon the widow's rights. The object of the legislature was to compel the widow to make her election a reasonable time after the death of her husband. (*Hawley* v. *James*, 5 Paige, 446.) The right to dower out of the estate is a strict legal right, of which the widow cannot be deprived save by her own act in waiving it, or in accepting some other and inconsistent provision. Nor does the statute attempt to deprive her of it; but it provides that, where something else is given to her in lieu of it, if then she does not do some act evidencing a renunciation of the gift, in favor of what the law will admeasure to her, within the period of a year after the husband's death, such conduct shall be deemed an acceptance of the husband's provision for her. This being, then, a statute of limitation upon the widow's right to enforce her claim to dower, the policy of the law in such a case, as in all cases involving the operation of such a statute upon a person's rights or demands, forbids the granting of relief against its provisions. The statute has acted, and the right has gone.

Nor is this the ordinary case of election, where knowledge is necessary in order to make it validly; and hence, where there was a mistake of facts, or a misconception as to rights, relief in equity is allowable. Here the statute does not offer or create the election. That existed already. The office of the statute was to impose

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a limitation of time upon the exercise of the power to elect, and to bar any subsequent exercise of it.

But a phase of this case is presented as to a possible estoppel upon Mrs. Kellogg through the acts alleged. A party may be estopped from taking advantage of the legal helplessness of another by reason of his conduct or representation having brought about such a condition. Is that the case here? Assuming that the allegations of the complaint might be deemed, with some latitude of judgment, to make out such an apparent estoppel upon Mrs. Kellogg, do the proofs make out such a case? I am unable to agree in such a view.

The testator died in 1881. The lands in question had been conveyed to his daughter, Mrs. Kellogg, for a nominal consideration, in 1877. Testator and his wife had lived upon them much of the time. Five days after his death the deed of conveyance was recorded. The statements which the plaintiff refers to as having been made by Mr. Kellogg can scarcely be deemed such as would bind Mrs. Kellogg, even though made in her presence by her husband. But such as they were, they amounted to nothing more than expressions of opinion. To say, the day after the funeral, when the will had been read, that plaintiff would "receive much more than if she received her dower," or, again, shortly thereafter, to say that there would be "money enough for us all," have not the weight of representations of facts, and certainly do not authorize a reliance upon them, without investigation. Even if we assume that the representation by Mr. Kellogg to the effect that the plaintiff would receive $1,200 to $1,300 a year was made within the year after testator's death, and not, as I think clearly appears from the proofs, some time in 1883, more than a year after testator's death, that would not exempt plaintiff from the duty of herself examining into the condition of affairs. What was that but opinion?

With matters of opinion, equity is not concerned. A representation which states a probability or possibility, or is conjectural, is not to be relied on or acted upon.

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She could have ascertained the extent, condition, and tenure of the real estate, and the nature of the assets and liabilities of the personal estate. She was bound to know that the law compelled her to make her election as to whether she would abide by the will or not within a year. Ignorance of that law is no excuse; and expressions of opinion by interested persons cannot, though subsequently shown to have been groundless or false, be regarded as misrepresentations. But I am unable to see that this plaintiff was really so ignorant as she pleads. There is enough in her own letters in the case to show that she was pretty well informed upon estate affairs generally; and in a letter from Kellogg to her he speaks of this farm as a separate account, in which he acted by power of attorney. This was within the year after testator's death, and should have directed her attention to that subject. In this state the statute is imperative upon this subject of a widow's election, and there is no other provision relieving from its strictness, as in some of the states, where the widow's dower right is retained to her if the property of the deceased is taken for his debts. Cases under such laws are inapplicable. Nor are authorities in point where the facts show that the widow was actually prevented from exercising any election, or where the will or the provisions in lieu of dower have entirely failed. If a widow has accepted a testamentary provision, and it or the will shall fail for illegality, she is not bound, and equity will relieve, provided the rights of creditors or purchasers are not concerned, and will permit her to claim dower. (*Hone* v. *Van Schaick*, 7 Paige, 221-223). The reason of this principle is too obvious to be dwelt upon. There must be a possibility for an election, or there is no election. An illegal or invalid provision gives nothing.

None of the exceptions to rulings call for our consideration, and I think the judgment appealed from should be affirmed, with costs.

All concur.

Judgment affirmed.

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APPEAL OF MERCHANTS' FUND ASSOCIATION.

(136 Pennsylvania State, 43.)

CONSTRUCTION — INCOME — LIFE ESTATES AND REMAINDERS IN SHARES OF STOCK.

Testator left his residuary estate to trustees to pay the net income therefrom to his daughter during her life, and, after her death, the principal to a charitable association. Part of the estate consisted of shares in a land company, held by testator. The company was unincorporated, but was organized by a contract entered into by its members, which provided that its business should be to buy and sell land, and should be carried on by trustees in their own names; that the interest of each member should be measured by his shares of stock, which he could sell and transfer without consulting with his associates, and without impairing the power of the trustees, or the existence of the company; that the stockholders should select the trustees to manage the business, and should be entitled to a distributive share in the profits. After testator's death, the trustees sold part of the land belonging to the company, and declared a dividend of the profits thereon. The increased price of the land was due to the discovery of copper on adjacent lands after testator's death. *Held*, that the dividend was personal estate representing income, and that having accrued after testator's death it went to his daughter.

APPEAL from the Orphans' Court of Philadelphia county.

James Bayard Henry and *George Junkin*, for appellant.

Richard C. Dale and *Henry C. Olmsted*, for appellee.

WILLIAMS, J. The contest in this case is between the life-tenant and the remainderman, and the question is whether the fund in the hands of the trustees is income or principal. It appears that George L. Oliver was one of the persons who organized the Metalline Land Company of Lake Superior, and that he remained a member of the company until his death, in 1886. This company was organized on the joint-stock plan, with a capital divided into 20,000 shares, having a nominal or face value of $5 each. At the time of his death, Oliver held 5,582 shares. By his will, he

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made some specific gifts, and placed the residue of his large estate in the hands of trustees, with directions to pay the net income derived therefrom to his daughter during her life, and the principal after her decease, to the Merchants' Fund Association for certain charitable uses. The Metalline Land Company owned about 600 acres of land when Oliver died, and two years later sold 40 acres of it for a half million of dollars. The larger part of this price has been divided by the company among its stockholders, and the dividend accruing to the Oliver stock is over $100,000. The daughter claims it as income. The appellant claims it as principal. To which of them should it be awarded?

Before determining this question it will be best to consider some preliminary ones that lead up naturally to it. These are: *First.* What is the legal status of the company? *Second.* What is the relation of the stockholders to the company? *Third.* What is the interest of a stockholder in the company property?

The company is unincorporated, and is a partnership organized on the joint-stock plan by the contract entered into by its members. This contract designates and describes the business to be done, the capital to be used, and how it is to be paid in by the members, and limits the number of persons by whom the affairs of the company are to be conducted. It provides that the interest of each member in the joint fund is to be measured by his shares of stock, which he may sell and transfer without consultation with his associates, and without impairing the power of the trustees, or the existence of the company. The partnership thus formed, whatever the liability of its members to third persons may be, is an artificial juridical person capable of acquiring, holding and selling property. Ordinarily, a partnership can convey its real estate only by the deed of all its members; but this company gave to its trustees power to buy, encumber, and sell land for it in their own names. It was a dealer in land as a commodity, using the names of its trustees in all its transactions. The principle that an unincorporated com-

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pany or firm may deal in land, and that when it does so it holds the title, and may encumber or convey it was settled in *Brady* v. *Colhoun*, 1 Pen. & W. 140. The relation of the stockholders to the company is also settled largely by the articles of agreement. They contribute the capital, select the trustees who are to use and invest it, and are entitled to a distributive share of the profits made in the business. As between themselves, however it may be as to others, they are liable for losses in proportion to their stock. They have, however, no power to use the name of the company, to interfere with its business, or to bind it in any manner. This power they have voluntarily surrendered and committed to the trustees selected by them as the agents and representatives of the company; so that the firm or company speaks not through its members as such, but through its trustees. These are liable for their fidelity to the trust, and for all profits made in the business, in substantially the same manner that a board of directors is liable to the stockholders in an incorporated company. In partnerships of the ordinary character, each partner is the agent of his firm, has personal contact with and control over its affairs, and the right to possession in common with his copartners of the firm property; but, under the agreement organizing the Metalline Land Company, the relation of the individual member to the firm was changed, and his rights reduced, so that the stockholder had only a right to participate in the election of trustees, and to receive his share of the money made.

The interest of the stockholder in the company property is controlled by his relation to the company under his agreement, and by the nature of the business done. The object in buying was not to mine or operate in any other manner, but to sell again so as to make gain by the purchase and sale of land; and the articles provided for the division of the profits made by such purchase and sale among the stockholders. The interest of each member was therefore an interest in the profits made. He had no title to the land bought

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by the trustees for the company as a tenant in common or otherwise, and could neither convey nor encumber it. His interest in it was personal estate, and the extent of that interest was shown by his certificates of stock. *Kramer* v. *Arthurs*, 71 Pa. St. 165; *Brady* v. *Colhoun*, *supra*. The company was the real owner of the land, and the trustees acting for it could alone encumber or convey it. The stockholder had, as a partner has, a resulting interest in the business and assets of the company which can be legally ascertained only by an account. *Meily* v. *Wood*, 71 Pa. St. 488. The purchase of real estate by a firm or company dealing in it, is, as between itself and its members, a conversion of it into personalty, and the levy and sale of the land upon a judgment against an individual member of the firm passes no interest or estate in it to the purchaser. The creditor of one partner can acquire by levy and sale of his debtor's interest no greater right than his debtor held,—viz., the right to an account and to a distributive share of what may remain after the payment of the firm debts on final settlement. *Ebbert's Appeal*, 70 Pa. St. 79; *West Hickory M. Ass'n* v. *Reed*, 80 Pa. St. 38; *Meily* v. *Wood*, 71 Pa. St. 488. The interest of Oliver as a stockholder in the land company was therefore not that of a tenant in common of its lands, but that of one entitled to share in the profits of the business. The trustees under his will succeed him as holders of his shares, and their interest as such holders is neither greater nor less than his interest was while he was living. The company was not dissolved by Oliver's death, and has not yet been dissolved. It has done but little business for several years, but it has paid the taxes on its lands, and kept up its own organization, and still holds, undisposed of, nearly 600 acres in the names of its trustees. The relation between it and the holders of its stock is therefore the same since Oliver's death as before. He had no title to the lands of the company while he lived, and none could pass from him to the trustees under his will by reason of his death. His interest as a stockholder was personal estate in his hands,

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and it is personal estate now in the hands of his representatives. The dividend made by the company out of the proceeds of the 40 acres has the same character, and is governed by the same rules, as though it had been made in his life-time. It represents part of the difference between the cost of the land sold, including taxes and expenses, and the price received for it. That difference is the profit, made by means of the purchase and sale of the land, which it is the duty of the trustees to divide among the stockholders. It is clear, therefore, that this dividend is personal estate, and represents gain or profit made in the proper business of the land company,—that of buying land for purposes of sale, and selling it with a view to make gain for the stockholders. The will directs the payment of the net income from his estate, real and personal, to his daughter, and as this dividend represents income it goes to the daughter, and not to the remainderman. The shares are part of the residuary estate, and belong to appellant. The profit accruing from the sale of lands is income from the investment in the stock of the land company, and if made since the death of Oliver is not to be distinguished from income derived from any other source.

This leads us to the only other question, which is, when was the profit out of which this dividend is declared earned? It is urged that it has not been earned since Oliver's death, and that for that reason, admitting it to represent profits, it belongs to the remainderman, under the rule in *Earp's Appeal*, 28 Pa. St. 368. The argument is that the phenomenal advance in the price of this piece of land is not due to anything done by the land company by way of development or otherwise, but to the presence of a rich deposit of copper ore which was in place when Oliver died; for this reason, it is said, the real value of the land has not changed. Nothing, therefore, has been gained by reason of anything done by the company.

The reply to this is that the object of forming the company was to buy lands in advance of any general

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knowledge of their mineral value, and, by means of openings or borings, develop their true value, and then sell. Whether the work which demonstrated the existence of the deposit of copper on the 40 acres was the work done by it or by its neighbors is unimportant. The mineral value was made apparent in either case, and a sale at a greatly increased price made possible. The increased price came, not from a change in the actual value, but from a correct knowledge of that value, which increased the market price. This knowledge was acquired, and the price advanced in consequence of it, after Oliver's death. When he died, the stock was thought to be of little value, and the lands could not have been sold at a profit. There were therefore no accrued or undivided profits to pass to the remainderman, and the wonderful advance made since his death has been earned within the meaning of the rule in *Earp's Appeal*, by means of developments made in the neighborhood since the title was vested in the trustees named in his will. *Earp's Appeal* is, therefore, in harmony with our holding in this case. The same is true of *Wiltbank's Appeal*, 64 Pa. St. 256, and *Moss' Appeal*, 83 Pa. St. 264. In the latter case, the question was over the character of the option to subscribe for new shares of stock belonging to existing stockholders by virtue of their ownership; and this court held that the option did not represent profits earned, but the right of the holder to increase his investment with a view to enlarged operations and greater profits to be earned thereby in the future. It belonged therefore to the owner of the stock, and not to the owner of the income. The circumstance that the entire block of shares in the land company was appraised at five dollars is without significance. It is now clear that the shares are worth all that has been invested in them, and that the remainderman is many thousands of dollars better off than was supposed when the inventory was taken. But the net income is not his. That goes to the daughter.

The decree of the court below is affirmed, and the costs of this appeal are to be paid by the appellant.

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CORRIGAN *vs.* JONES.

(14 Colorado, 311.)

PROBATE IN ANOTHER STATE.

A will should be admitted to probate in the jurisdiction of the testator's last domicile; but in admitting a will to probate the court must be presumed *prima facie* to base its adjudication respecting the last domicile upon sufficient evidence, and, under such circumstances, the probate and record thereof can only be questioned by some appellate or direct proceeding. The general rule is that letters testamentary or of administration have no extraterritorial force. When such letters have been duly granted in the jurisdiction of deceased's last domicile, they are the principal letters of authority, and those granted in other jurisdictions are ancillary.

A will admitted to probate in the court of another state having jurisdiction of such matters is, on the presentation of the duly certified record thereof, entitled to be admitted to probate and record in this state, and letters testamentary or of administration may issue thereon as in other cases. The probate and record, under such circumstances, would seem to be mandatory; but the court is invested with discretion in the matter of issuing letters, but the discretion is not arbitrary. It must be sound and reasonable,—such as will secure the administration of the estate according to the will of the deceased, as well as with due regard to local creditors.

ERROR to Bent County court.

Stallcup & *Shafroth* and *Steele* & *Malone* for plaintiffs in error.

George Q. Richmond, for defendant in error.

ELLIOTT, J. In October, 1884, the last will and testament of Owen Doherty, deceased, was admitted to probate and record in the probate court of Jackson county, state of Missouri, and thereupon letters testamentary were issued by said court to Bernard Corrigan, who was appointed executor in and by said will. The executor, Corrigan, is one of the plaintiffs in error in this proceeding. The property of the testator, as described in the will, consisted of "cattle and cattle ranches in Bent and Las Animas counties, in the state of Colorado."

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Corrigan having procured a transcript of the record of the Jackson county probate court in the matter of the probate of said will, duly certified in the manner required by the act of congress in such cases, presented the same to the Bent county court, and asked that said will be admitted to probate and record in that court as provided by the statute of this state in such cases. The judge of the Bent county court thereupon issued a citation to the defendant in error, James C. Jones, who had theretofore been appointed administrator of said Owen Doherty by said Bent county court, notifying said Jones to appear and show cause, if any he had why said will should not be admitted to probate in said Bent county court, and letters testamentary be granted to said Corrigan, and the letters of administration heretofore granted to said Jones be revoked.

Jones appeared, and by his attorney protested against the probate of said will, and against the granting of letters testamentary to said Corrigan. The grounds of protest may be considered under two principal heads: *First*, that the probate of the will by the Missouri court was invalid, inasmuch as the domicile of Doherty at the time of his death was in Bent county, Colo., and not in Jackson county, Mo.; *second*, that letters testamentary could not lawfully issue to said Corrigan, he being a non-resident of the state of Colorado.

Corrigan, by his attorney, filed a written brief and argument in response to the protest of Jones. The court, having considered the argument of counsel, without taking any evidence as appears by the record, rendered judgment refusing to admit said will to probate, and refusing to grant letters testamentary to said Corrigan until the will of said Doherty should be proved to the court in a satisfactory manner. To reverse this adjudication the case is brought to this court by writ of error.

Plaintiffs in error rely upon section 27 of the statute of wills, (chapter 115, Gen. St. Colo.,) in support of their claim to have the will of Doherty admitted to probate in this state upon the certified record of its probate in the Missouri court.

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In support of his protest on the ground of domicile, appellee relies upon the recital at the beginning of the will, as follows: "I, Owen Doherty, of the county of Bent, in the state of Colorado, temporarily residing in Kansas City, Missouri."

The will bears date February 7, 1884. It was offered for probate in the Missouri court on July 8th of the same year. The precise date of Doherty's death does not appear, but it may have been five months after the execution of the will; so that, whatever weight the recital in the will may have as evidence of the testator's domicile at the time of its execution, it is not conclusive of that question, and is but a circumstance indicating his domicile at the time of his decease. Besides, the record of the probate of the will declares the same to be "the last will and testament of Owen Doherty, deceased, late of Jackson county."

In admitting the will to probate, the Missouri court must be presumed *prima facie* to have based its adjudication respecting the domicile of Doherty at the time of his decease upon sufficient evidence. Under such circumstances, the probate of the will, and the record thereof, can only be questioned by some appellate or direct proceeding. Const. Mo. art. 6, § 34; 1 Rev. St. Mo. 1879, §§ 1176, 3974; Wells, Juris. § 274; 2 Greenl. Ev. § 672; *Woodruff* v. *Schultz*, 49 Iowa, 430; *Bostwick* v. *Skinner*, 80 Ill. 147; *Monell* v. *Dennison*, 17 How. Pr. 422; *Irwin* v. *Scriber*, 18 Cal. 500; *Thompson* v. *Tolmie*, 2 Pet. 157; *Inhabitants of Ward* v. *Oxford*, 8 Pick. 476.

The will, having been duly admitted to probate in Missouri, should, on the presentation of the duly-certified record thereof, have been admitted to probate and record in this state, and letters testamentary should have issued thereon to the executor named in the will, or letters of administration with the will annexed should have been granted thereon as in other cases, according to the provisions of Gen. St. Colo. c. 115. Our statutes in this respect are based upon principles of comity. The general rule is that letters testamentary or of administration have no extraterritorial force. When such let-

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ters have been duly granted in the jurisdiction where the deceased has his last domicile, they are regarded as the principal letters of authority, and those which may be required in other jurisdictions, where property of the deceased requiring administration may be located, are considered as ancillary merely. Schouler, Ex'rs, c. 7; *Shepherd* v. *Rhodes*, 60 Ill. 301; *Davis* v. *Estey*, 8 Pick. 475; 1 Redf. Wills, 397.

In support of his second ground of protest, appellee cites section 36, c. 22, of our Gen. Statutes, which provides, in substance, that any executor or administrator *appointed in this state* who shall remove without the limits of the state shall, *under certain circumstances*, be removed from his office as such executor or administrator. This section falls short, however, of sustaining the position of appellee that a non-resident executor, deriving his authority *under a will*, may not receive in this state letters testamentary, ancillary to those granted to him upon an authorized probate of the will in the state of the testator's last domicile.

The case of *Child* v. *Gratiot*, 41 Ill. 357, is also cited by appellee as sustaining the doctrine that a non-resident cannot, under any circumstances, be permitted to exercise the office of executor or administrator in this state. The opinion in that case is based upon a statute somewhat different from ours. Laws Ill. 1847, p. 63; 1 Starr & C. Ann. St. c. 3, par. 31.

Besides, the facts of the case are not analogous to those under consideration. That was a case of a non-resident administrator. The statute of Illinois above cited, as construed in *Child* v. *Gratiot*, makes removal from the state a cause for the removal of any executor or administrator from his office. Section 21, Rev. St. Colo. 1868, p. 525, was similar to the Illinois statute; but, as amended, (section 24, Gen. Laws 1877, p. 260,) removal from the state is a ground for removal from office only when the executor or administrator is "appointed in this state." In the case of executors the change is significant. Executors, though receiving their letters from the court, derive their appointment

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as well as their authority primarily from the will itself, while administrators derive their authority and appointment directly from the court.

A non-resident executor deriving his authority and appointment from a will executed abroad, and admitted to probate in the jurisdiction of the testator's last domicile, may come to this state, and, upon presenting a record of the probate of such will, duly certified, is entitled to have the same admitted to probate and record in this state, and thereupon letters testamentary or of administration *may issue* thereon as in other cases. Gen. St. 1883, c. 115, § 27. The probate and record of the will, under such circumstances would seem to be mandatory; but the court is doubtless invested with some discretion in the matter of the issuance of letters testamentary or of administration. But the discretion is not an arbitrary one. It must be sound and reasonable,—such as will secure the administration of the estate according to the will of the deceased, as well as with due regard to local creditors. Such would seem to be the proper construction of our statutes of wills and administration, and such is the doctrine of the standard authorities heretofore cited upon the subject.

Our conclusion is that it was error to refuse to admit the will of Doherty to probate and record in this state; and that, the will being probated, letters testamentary should issue thereon to the executor named therein, unless it be made to appear to the court that such executor is in some manner disqualified, or incapable of administering upon the estate of the non-resident in this jurisdiction, with due regard to the rights, interests, and convenience of local creditors; in which case letters of administration with the will annexed should be granted, as provided in section 31 of the statute.

The judgment of the county court is reversed, and the cause remanded for further proceedings in accordance with this opinion.

Reversed.

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SCAIFE *vs.* EMMONS.

(84 Georgia, 619.)

NUNCUPATIVE WILLS.

On proceedings to establish an alleged nuncupative will, made by deceased three days before his death, whereby he gave nearly all his property to his widow, to the exclusion of his children, it is proper to charge the jury that the nuncupative will must be strictly proved in all essential points; that it must be made as a matter of necessity, and not as a matter of choice; that it must appear that the deceased was *in extremis* when he made the will; and that the jury should find against the nuncupative will if they believed from the evidence that deceased had plenty of time and opportunity to execute a formal wrtten will.

ERROR from the superior court of Mitchell county. The facts are fully stated in the opinion.

Donalson & Hawes and *D. H. Pope*, for plaintiff.

Spence & Twitty and *I. A. Bush*, for defendants.

SIMMONS, J. Mrs. Margaret J. Emmons, now Mrs. Scaife, sought to have admitted and established as the will of her husband, Dr. H. R. Emmons, what she alleged to be a nuncupative will made by him about the 20th day of February, 1888, during his last illness, and three days before his death. By it he gave to his wife the house and lot on which they lived, and all the furniture and other property in it; also his farm in Mitchell county, and the mules and other property on it; also the cabins and lots he had rented out to negroes; also his store-house and lot in Camilla, and all the goods and other property therein. Indeed, he gave all of his property to her, except his wild lands. He left a son, Eugene, and a daughter, Minnie, who caveated the probate of the will on various grounds. The jury found for the caveators, and petitioner moved for a new trial, which was overruled by the court, and she excepted.

The main grounds relied on before us for a reversal of the judgment of the court below in refusing to grant

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a new trial were the third, fourth, and fifth, which are as follows: (3) Error in charging: "Nuncupative wills, being as a rule no favorites of the court, demand strictness of proof in all essential points. This is requisite, in consideration of the facilities with which frauds in setting up nuncupative wills are obviously attended,—facilities which absolutely require to be counteracted by courts insisting on the strictest proof as to the facts of such alleged wills." (4) Error in charging: "A nuncupative will, to be valid, must be made as a matter of necessity, and not as a matter of choice. That is, a person who desires to make a will, and has time to make a written will, but deliberately determines to make a nuncupative will, such a nuncupative will is not valid." (5) Error in charging: "Before the jury would be authorized to find in favor of the will, it must appear from the evidence that Dr. Emmons, the testator, was *in extremis* at the time of making the will; and the words 'last sickness,' as used in the statute of this state, mean last extremity. The extremity must be such that the party speaking them is overtaken by so sudden or violent a sickness, or at least alters his wishes so shortly before his death, that there is afforded thereafter no convenient time or opportunity to have reduced his words to writing, and executed a formal will. If the jury believed from all the evidence in the case, that the testator did have plenty of time and opportunity to have executed a formal written will, then it would be their duty to find against the nuncupative will." There has been some conflict in the decisions of the courts upon the propositions announced to the jury by the trial judge in this case, as contained in the three grounds above set out. The Supreme Court of Alabama, in the case of *Johnson* v. *Glasscock*, 2 Ala. 218; the Supreme Court of Illinois, in the case of *Harrington* v. *Stees*, 82 Ill. 50; and the Supreme Court of Tennessee, in the case of *Nolan* v. *Gardner*, 7 Heisk. 215,—held that it was unnecessary that the nuncupation should be made when the testator is *in extremis*. But we think that the great and decided weight of authority is in

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favor of the propositions announced by the trial judge, and complained of in the grounds of the motion for a new trial above quoted. The reason for the rule is so well put in some of the cases in which this doctrine is discussed that we deem it unnecessary for us to do more than refer to them. See *Prince* v. *Hazleton*, 20 Johns. 562; S. C. 11 Am. Dec. 307; *Yarnall's Will*, 4 Rawle, 46; *Werkheiser* v. *Werkheiser*, 6 Watts & S. 184; *Boyer* v. *Frick*, 4 Watts & S. 357; Notes to *Sykes* v. *Sykes*, 20 Amer. Dec. 40; *Haus* v. *Palmer*, 21 Pa. St. 296; *O'Neill* v. *Smith*, 33 Md. 569; *Reese* v. *Hawthorn*, 10 Grat. 548; *Carroll* v. *Bonham*, 42 N. J. Eq. 625, 9 Atl. Rep. 371, 26 Amer. Law Reg. 568, (with notes), and 25 Cent. Law J. 328, (with notes). See, also, Beech, Wills, 10; Schouler, Wills, § 365; 1 Redf. Wills, 185. See, also, the opinions of WARNER, J., and LOCHRANE, C. J., in *Ellington* v. *Dillard*, 42 Ga. 378 *et seq.*

Judgment affirmed.

Nuncupative wills.—In the case of Harrington v. Stees, 82 Ill. 50, 53, the court say:—

"It is contended, first, that this will was not made 'in the time of the last sickness' of deceased in the sense in which the words are used in the statute. It is strenuously insisted that such a will, to be valid, must have been made *in extremis* or when the testator is overtaken by sudden and violent sickness and has not time or opportunity to make a written will. This rule was laid down by Chancellor Kent in the case of Prince v. Hazelton, 20 Johns, 501. That case was decided by a mere majority of the court, and Mr. Justice Woodworth dissented in a very elaborate opinion. This question received a very able and critical review in the case of Johnson v. Glasscock, 2 Ala. (N. S.) 242, where the case of Prince v. Hazelton and the authorities relied upon by Chancellor Kent are very fully considered. In the latter case the court deduced the following rule: 'If a person in the sickness of which he subsequently dies, impressed with the probability of approaching death, deliberately makes his will in conformity to the statute, we do not feel authorized to say that it will be invalid because, in point of fact, he had time and opportunity to reduce it to writing.'"

In Prince v. Hazelton, 20 Johns 502, which is a much quoted decision, it is clearly held that a nuncupative will is not valid unless it is made when the testator is *in extremis*. This opinion contains the substance of all the learning upon the subject of nuncupative wills, from the earliest days to the date when it was rendered (November, 1882), and "very little," says Judge Redfield (1 Redf. on

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Wills, 184), "has since occurred which could add much to the very full discussion which the subject there receives." See, also, Sykes v. Sykes, 2 Stew. (Ala.) 364; an early case in which the question is well discussed, and Nolan v. Gardner, 7 Heisk, 215.

GREENLAND *vs.* WADDELL.

(116 New York, 234.)

EQUITABLE CONVERSION—POWERS—TRUSTEES AND EXECUTORS.

A will devising and bequeathing all the testatrix's estate, real and personal, to executors, with power of sale, for the purpose of distributing the proceeds as directed, produces an equitable conversion of the real estate into personalty.

The will devised and bequeathed testatrix's estate to executors, with power of sale for the purpose of distributing the proceeds, one-third each to testatrix's brother and sister, and the income of the other third to another sister, A., while she remained the wife of her then husband. If she survived him she was to take the *corpus* of the fund, and if she did not, it was to go to her lawful issue, if she left any surviving her, who reached the age of 21 years; otherwise it should go to testatrix's brother and the other sister. When testatrix died A. had no children living. *Held*, that the direction to pay the fund to A.'s children in the event mentioned, or, on their failure to arrive at the age of majority, to testatrix's brother and sister, was void under 1 Rev. St. N. Y. p 773, § 1, forbidding the suspension of the ownership of personal property for more than two lives in being at the death of testatrix.

The power of sale given by the will to the executors is not within the statutory term of express trusts, to execute which the supreme court has power to appoint trustees under 1 Rev. St. N. Y. p. 730, §§ 69, 70. The power of sale being vested in executors, such power would be taken by an administrator with the will annexed, and, on the acceptance by the supreme court of the resignation of the surviving executor, the power of sale could not be executed by a trustee appointed by the supreme court.

Upon the resignation of the surviving executor, the supreme court appointed A. as trustee, to whom testatrix's brother and other sister conveyed and transferred their contingent interest in the property. *Held*, that, as testatrix would die intestate as to such fund in case A. did not survive her husband, or in case the power of sale was not exercised by sale of the land during her life, the intestacy would

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be applicable to it as real estate and the land or personalty would go to testatrix's next of kin, the brother and sister. The issue of A., if she should leave any surviving her, would have no interest in the fund or property, and, if she did not survive her husband, her interest would be only a life-estate. The brother and sister having conveyed their interest to A., she acquired the entire beneficial interest in the property, making the exercise of the power of sale unnecessary.

APPEAL from City Court of Brooklyn, General Term. The action was brought to recover a certified bank-check, representing the balance alleged to be due of the purchase price of real estate sold and conveyed in March, 1885, by the plaintiff to the defendant Waddell, which bank-check the latter had deposited with the defendant Major. It appears that at the time of the delivery of the deed to the defendant Waddell, he paid all the purchase money except $1,000, for which amount he delivered his check to Major, pursuant to an understanding with plaintiff that it be held until the title was examined, and, if found to be "such as a party could be compelled to accept under a contract assuring a title in fee," then the check should be delivered to the plaintiff. After examination the defendant Waddell notified the plaintiff that the deed did not convey a good title to one-third of the premises, and thereupon tendered reconveyance to the plaintiff, and demanded repayment of the money he had paid. This was refused, and the action was thereafter commenced. The title to the one-third in question was in Agnes Boerum, who died in the year 1875, leaving a will, which was admitted to probate and recorded. By it she appointed her brother, Fulkert R. Boerum, and Charles H. Vanderveer executors, to whom letters testamentary were issued. So far as essential for reference here, her will was as follows: "After all my lawful debts are paid and discharged, I give and bequeath and devise unto my executors, * * * and the survivor of them, all and singular my estate and property, real and personal. * * * to have and to hold the same in trust to receive and collect the rents, issues, and profits, interest and income

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thereof, and as soon after my decease as in their judgment they shall deem expedient, and for the best interest of my estate, to sell, assign, transfer, dispose of the same either at public or private sale, * * * and to divide, pay, and distribute the proceeds thereof, together wth the whole of my estate, as follows: To my sister, Susan Vanderveer, wife of Charles H. Vanderveer, one equal third part thereof; to my brother, Fulkert R. Boerum, one equal third part thereof. The remaining one equal third part thereof, I hereby order and direct my said executors safely and securely to invest and reinvest from time to time, in their discretion, upon such security, and in such manner, as they shall deem advisable and proper, to receive and collect the interest or income thereof, and, as the same shall by them be so collected, to pay the same to my sister, Adrianna Bush, wife of Charles Bush, for and during the joint lives of her and her husband; * * * and in case my said sister, Adrianna Bush, shall die before her said husband, leaving lawful issue her surviving, then my executors shall, from and after such death, pay such interest or income thereof, or such portion of such interest or income as may be necessary, towards the support, maintenance, and education of the child or children of my said sister Adrianna Bush, until the youngest child shall arrive at the age of twenty-one years, and, on said youngest child arriving at such age, my said executors shall pay and transfer to the child or children that shall then be living the whole of said remaining one-third, with its accumulations, and on the death of all said children before arriving at such age, or on the death of my said sister, Adrianna, without leaving lawful issue her surviving, my executors shall pay the remaining one-third, with its accumulations, to my brother, Fulkert R. Boerum, and my sister Susan Vanderveer, to be divided equally between them, share and share alike; and in case my said sister, Adrianna Bush, shall survive her husband, Charles Bush, then on the death of her said husband, the said remaining one-third, with its accu-

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mulations, shall be paid and transferred to my said sister, Adrianna Bush, absolutely, in preference to any other disposition thereof."

In 1883 the executor Vanderveer died, leaving Boerum the sole surviving executor. In February, 1884, Fulkert R. Boerum, and Susan Vanderveer conveyed all their interest in the premises in question to Mrs. Bush and shortly thereafter, upon the petition of Boerum, and with the consent of Mrs. Bush and Mrs. Vanderveer, an order was made by the supreme court accepting the resignation of Boerum as trustee of such will, and discharging him accordingly, and from all obligation to account further, etc., and by the same order Mrs. Bush was appointed trustee under the will, and directed to file security, etc. Shortly afterwards Mrs. Bush, as trustee, made to one Joslyn a deed of the premises, which he thereupon reconveyed to her, and she individually made deed of conveyance to the plaintiff. This was the evidence of the title claimed by plaintiff to the one-third in question, at the time of the commencement of the action, to have been conveyed to the defendant; but before final judgment a further deed was made by Mrs. Bush, as such trustee, to the plaintiff, which was treated as effectual for purposes of the action as if made before its commencement. The judgment directed by the trial court for the plaintiff was reversed, and new trial granted by the general term. Plaintiff appeals.

Jesse Johnson, for appellant.

A. B. Carrington, for respondents.

BRADLEY J. The question is, whether or not the deed of conveyance made by the plaintiff to the defendant Waddell was effectual to convey a perfect title to the one-third of the premises of which Agnes Boerum died seized, and that depends upon the result of the inquiry whether the deeds of Mrs. Bush, individually and as trustee of the will of Agnes Boerum, to plaintiff conveyed such title to him.

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The will was productive of an equitable conversion of the real estate of the testatrix into personalty; and, for the purpose of the execution of the trusts created by the will, it must be so treated. (*Kane* v. *Gott*, 24 Wend. 641; *Stagg* v. *Jackson*, 1 N. Y. 206; *Everitt* v. *Everitt*, 29 N. Y. 39). By the terms of the will the entire estate of the testatrix was devised and bequeathed to the executors, and they were given the power of sale for the purpose of distributing the proceeds as directed; that is to say, two-thirds of the amount to be paid to two distributees, and the income of the other third to Mrs. Bush while she remained the wife of her then husband. If she survived him, she was to take the *corpus* of the fund, and if she did not, it was to go to her lawful issue, if she left any surviving her, who reached the age of 21 years, otherwise it should go to her brother, Mr. Boerum, and her sister Mrs. Vanderveer.

The executors took no title to the real estate as such. They were vested with a power to deal with it as personal estate, for the purposes of the execution of trusts created by the will; and one question presented is whether the power of sale came within the duty of a trustee, as distinguished from that of an executor. The question as to where is located the line between the duties which fall upon an executor, and may be discharged by an administrator with the will annexed, and the power which must be executed by a trustee, has been involved in some uncertainty in view of the apparent want of harmony in judicial opinion upon the subject. The theory upon which the distinction seems to have been founded is that the duties of an executor pertain to the office, and those of a trustee to the person; that the character given to a trustee has relation to a personal trust, while that of an executor is official solely. Hence it has, in the more recent case of *Mott* v. *Ackerman* (92 N. Y. 553), been said by Judge FINCH, in speaking for the court, that, "where the power granted or duty involved imply a personal confidence reposed in the individual over, above and beyond that which is ordi-

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narily implied in the selection of an executor,—the power and duty are not those of executors *virtute officii*, and do not pass to the administrator with the will annexed." And when a discretionary power of sale is given to executors, or when, in the sense as applied to trusts, the duties imposed are active, the executors will be deemed trustees, and such powers cannot be executed by an administrator with the will annexed. (*Cooke* v. *Platt*, 98 N. Y. 35; *Ward* v. *Ward*, 105 N. Y. 681, 1 N. E. Rep. 373.) In the present case the real estate of which the testatrix died seized became, by virtue of the direction in her will to sell for the puposes there mentioned, personalty as of the time of her death, upon the principle applicable to such case that what is directed to be done by the will may be regarded as done at the time directed. The doctrine of equitable conversion rests upon that principle. (Pom. Eq. Jur., § 161.) The power to receive the rents and profits of the land intermediate the death of the testatrix and the sale did not qualify the character as personalty of the land in the hands of the executors. That is incidental to the directions to sell, and the rents and profits so received also have the character of personalty, and are assets in the hands of the executor. (*Stagg* v. *Jackson*, 1 N. Y. 206; *Lent* v. *Howard*, 89 N. Y. 169.) The title to the personalty vested in the executors by operation of law; and, to accomplish the purposes of the imperative direction in the will in that respect, it was within their power, and imposed upon them as a duty, by virtue of their office, to execute the power of sale. (*Lockman* v. *Reilly*, 95 N. Y. 64; *Meakings* v. *Cromwell*, 5 N. Y. 136; *Bogert* v. *Hertell*, 4 Hill, 492.) As the consequence of this, the proceeds of the sale, when received by the executors, would be legal assets in their hands, for which they would be required to account (*Hood* v. *Hood*, 85 N. Y. 561); and if any duties were to follow in respect to one-third of the fund which would require the function of a trustee to execute, the executors, as such, would remain responsible for it until the severance, in some

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manner, by them of the trust fund. (*In re Hood*, 98 N. Y. 363.)

We have proceeded far enough to show the relation of the executors, as such, to the powers given by the will, sufficiently for the purpose of the question here; and it is unnecessary to consider the nature of the duties which would be assumed after the sale, in the management of the fund, the income of which they were directed to pay Mrs. Bush.

The power of sale was vested in the executors; and, in view of the later authority giving construction to the statute in that respect (2 Rev. St. p. 72 Sec. 22), that power of sale would be taken by an administrator with the will annexed. (*Mott* v. *Ackerman*, 92 N. Y. 539.) It is, however, contended by the plaintiff's counsel that, notwithstanding the correctness of the proposition just stated, the power given to sell created a trust for that purpose, and as such came within the jurisdiction of the Supreme Court, and therefore the acceptance of the resignation of Boerum as trustee, and the appointment of Mrs. Bush as such by the court, pursuant to the statute, was effectual to vest in the latter the power to make the sale. (1 Rev. St. p. 730, §§ 69-71.) There is no doubt about the power of the court to provide the means for the execution of a trust when there ceases to be a trustee to complete it. The statute provides that, in case of death of a trustee of an unexecuted express trust, the trust shall vest in the Court of Chancery (now in the Supreme Court), with all the powers and duties of the original trustee, and shall be executed by some person appointed for the purpose under the direction of the court (Id. § 68); and that provision is applicable to powers in trust (Id. 734, § 102). It is said by text and judicial writers to the effect that the court of equity will not permit a trust to fail for want of a trustee to execute it. This means that the power of appointment of a trustee will be exercised by the court when occasion properly arises requiring it. Such were the cases of *Leggett* v. *Hunter* (19 N. Y. 445); *Delaney* v. *McCormack* (88 N. Y. 174); *Farrar* v. *McCue*

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(89 N. Y. 139); *Cooke* v. *Platt* (98 N. Y. 35); *Rogers* v. *Rogers* (111 N. Y. 228, 18 N. E. Rep. 636); and they are cited by counsel to support the contention that the trustee appointed by the court in the present case was vested with the power to make the sale and conveyance in question. It may be observed that those cases presented express trusts and powers in trusts within the Revised Statutes, and therefore came within the statute before referred to providing for the appointment of trustees to execute such trusts, and the appointments were essential for the excution of the trusts. The power of sale given by the will in question is not within the statutory term of express trusts, and no title passed to the executor of the land as such; and "a general power is in trust when any person or class of persons other than the grantee of such power is designated as entitled to the proceeds, or any portion of the proceeds, or other benefits, to result from the execution of the power." (1 Rev. St. p. 734, § 94.)

The statute upon the subject of trusts is not applicable to that created by this will, although analogous principles, to some extent, at least, are applied to those of personal property. (*Kane* v. *Gott*, 24 Wend. 641; *Cutting* v. *Cutting*, 86 N. Y. 545.) It may be assumed that the power is inherent in the Supreme Court, without the aid of the statute, to administer trusts, in so far that it may, upon the death or disability of a trustee of an unexecuted trust, appoint another to execute it; and for adequate cause may remove a trustee, and supply his place with another to complete the execution of a trust. This proposition is not applicable to an executor so far as relates to the duties of his office as such. As applied to him, the power is exclusively in the probate court.

The acceptance of the resignation, as trustee, of the person named as executor in the will did not, therefore, have the effect to relieve him from the execution, so far as it remained unexecuted, of the trust which was devolved upon him by virtue of the office of executor. 1 Perry, Trusts, § 281. (*In re Van Wyck*, 1

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Barb. Ch. 565; *Quackenboss* v. *Southwick*, 41 N. Y. 117.) While his relation as trustee, as distinguished from that of executor, may be treated as terminated by force of the order of the court, that of executor remained; and, as held in *Mott* v. *Ackerman* (*supra*), the power to make the sale being within the functions of the office of the executor, there is no occasion to extend the inquiry whether it would be in the jurisdiction of the Supreme Court to appoint a trustee to execute such a trust or power as that in question, in the event of a vacancy in the office of executor, or whether the power must, in such case, necessarily be executed by an administrator with the will annexed. While the executor remains in his relation as such, the court cannot appoint a trustee to supersede him in the exercise of his functions as executor. It cannot be assumed, upon the findings of the trial court, that all the duties of that officer had been discharged by him at the time his resignation of trustee was accepted by the court. The conclusion must follow that the power to make the sale and conveyance remained in the executor, and that Mrs. Bush did not, through her appointment as trustee, take such power. This was the ground upon which the General Term placed its determination, and, so far as appears, the inquiry there was not extended further than that.

There is a further question, having relation to the validity of the provisions of the will by which the testatrix sought to give the fund to the children of Mrs. Bush, if she left any surviving her, and in the event there mentioned. This question arises upon the statute, which provides that "the absolute ownership of personal property shall not be suspended, by any limitation or condition whatever, for a longer period than during the continuance, and until the termination, of not more than two lives in being at the date of the instrument containing such limitation or condition; or, if such instrument be a will, for not more than two lives in being at the death of the testator." (1 Rev. St. 773, § 1.) At the time of the death of the testatrix Mrs.

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Bush had no children living, and she never has had any. But, assuming that she does not survive her husband, and that on her death she leaves children surviving her under the age of 21 years, the inquiry arises whether the limitation over to them is valid, and that depends upon the determination of the further question,whether the absolute ownership would then vest in such children. If it would, there would be no unlawful suspension. Otherwise, it is difficult to see how the provision made for them by the will can be supported. The will does not, in terms, give the fund to the children, but directs the executors, in the events mentioned, to pay it to them. The postponement of the time of payment of a gift is not important, that alone will not qualify the absolute character of the ownership. The vesting of it is suspended if some period in the future is annexed to the substance of the gift. In the present case the conditions upon which the right of the children to take the fund depend are to or may arise in the future, beyond the time of the death of the mother, and the contingency is uncertain. The children must reach the age of 21 years, and, if they do not, the fact that the direction is that the fund go to Mr. Boerum and Mrs. Vanderveer is not consistent with the vesting of the absolute ownership in the children on the death of their mother. It is therefore clear that, in the case supposed, and which may arise, if Mrs. Bush should leave children her surviving, the observance of the direction of the will will operate to suspend the absolute ownership of the fund for some period of time after her death. (*Batsford* v. *Kebbell*, 3 Ves. 363; *Patterson* v. *Ellis*, 11 Wend. 259; *Warner* v. *Durant*, 76 N. Y. 133; *Delancy* v. *McCormick*, 88 N. Y. 174, 183.)

Such suspension being for a time not dependent upon lives, and not more than two, in being at the time of the death of the testatrix, renders the limitation over void, unless it is saved by some provision of the statute. We find none in its support. While the suspension of the absolute power of alienation of real estate may be

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extended beyond two lives limited, so as to embrace the period of minority of a child to whom the remainder is limited, and such suspension may be created by a contingent limitation of the fee (1 Rev. St. 723, §§ 15, 16; Id. 726, § 37), our attention is called to no statute qualifying, in that or any manner, the effect of the provision before referred to, limiting the time of suspension of the absolute ownership of personal property. The consequence seems to be that the direction of the testatrix, by her will, to pay the fund to such children in the event mentioned, or, on their failure to arrive at the age of majority, to pay it to Mr. Boerum and Mrs. Vandeveer, was in contravention of the statute, and void. (*Manice* v. *Manice*, 43 N. Y. 303.) It follows that, if Mrs. Bush does not survive her husband, the testatrix will have died intestate as to that fund, or, in case the power of sale is not exercised by sale of the land during her life, the intestacy may be applicable to it as real estate; and such property, either as land or personalty, will, unless given other direction in the meantime by those having a contingent interest in it, go to the heirs or next of kin of the testatrix,—those who were such at the time of the death of the testatrix; and not to those who will be such at the time the contingency occurs which produces the intestacy. (1 Rev. St., p. 751; 2 Rev. St., p. 96; *Hoes* v. *Van Hoesen* 1 Barb. Ch. 379; *In re Kane*, 2 Barb. Ch. 375.)

Such issue of Mrs. Bush, if she should leave any her surviving, will therefore have no interest in this fund or property derived from the provisions of the will; and, in the event she does not survive her husband, her interest is limited to a life-estate, or to the income of the fund during her life. As a consequence, then, and in that case, her brother and sister will be the only heirs and next of kin of the testatrix.

They have conveyed and transferred their unconditional and contingent interest in the property to her. By that conveyance Mrs. Bush acquired the entire beneficial interest in the property. This enabled her, individually, to convey it to the plaintiff. Her deed to

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the plaintiff had the effect to vest in him the title to the land. Since all the parties having any beneficial interest in it or its proceeds have thus joined in and made the conveyance, there remains no occasion for the exercise of the power of sale given by the will; and, upon the principle that the beneficiaries in the equitable conversion of real property into personalty may effectually elect to have a reconversion into realty, and take it as land, rather than the proceeds of it, we think the exercise of such power of sale may be deemed dispensed with and defeated. (Story, Eq. Jur., § 793; *Hetzel* v. *Barber*, 69 N. Y. 1; *Prentice* v. *Janssen*, 79 N. Y. 478; *Armstrong* v. *McKelvey*, 104 N. Y. 179, 10 N. E. Rep. 266.) In this case the beneficiaries are in a situation to do so, as the title of the property, treating it as land, was in those three, brother and two sisters, or some of them, and was nowhere else. There is therefore no intervening right of any other party to be prejudiced. The contingent and unconditional estates were united in Mrs. Bush by the conveyance to her. These views lead to the conclusion that the defendant has taken, by the conveyance to him, the title which the plaintiff undertook to convey; but, as the determination is made upon a ground not presented to or considered by the court below, the plaintiff should not have costs.

The order of the General Term should be reversed, and the judgment entered upon the decision of the trial court affirmed.

All concur.

Order reversed and judgment affirmed.

See, also, Matter of Corrington, 6 Am. Prob. Rep. 120; Parker v. Linden, 6 Am. Prob. Rep. 411, and the cross references.

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WOOLLEY *vs.* PAXSON.

(46 Ohio State, 307.)

LAPSE—DEATH OF DEVISEE.

Under Rev. St. Ohio, § 5971, providing that where a devise "is made to any child or other relative of the testator, if such child or other relative * * * shall die thereafter, leaving issue surviving the testator, * * * such issue shall take the estate devised in the same manner as the devisee would have done, if he had survived the testator," where a devise is made to I. "for the term of his natural life, afterwards to his children in fee-simple," and I. dies, and two of his children also die leaving issue in the lifetime of testator, the issue of the deceased children of I. take the share that their parents would have taken, had they survived the testator. OWENS, C. J., and WILLIAMS, J., dissenting.

ERROR to the Circuit Court of Green County.

Brown & Antrim, for plaintiff in error, A. L. Wooley, guardian.

Charles Darlington, for plaintiffs in error, Euphemia Caulfield and Maggie Caulfield.

W. A. Paxson, for defendants in error.

MINNSHALL, J. The original suit was brought by the executor of Aaron Paxson, deceased, to obtain a construction of an item of the will, about which he was embarrassed in the execution of his trust. The testator first devised all his estate to his wife for life, and then, after making certain other provisions, by the eighth item, on which the questions arise, he first directs his executors (we give the substance, quoting only those parts where the language is material), on the death of his wife, to convert his lands into money, and to divide the proceeds and other funds arising from his estate into four equal parts, one of which he then gives to his daughter Julia A. Stroop, "if she be living, or to her heirs if she be dead, at the time the same is ready to be paid." He then givs a like share, and upon the same terms, to the son of his daughter,

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Ivey Varner. He then disposes of the other two shares as follows: One is to be invested in land as soon as practicable, by his executors, and "conveyed" to his son Ezeriah Paxson "for the term of his natural life, and to his children, in fee-simple, afterwards." The other is, in like manner to be invested in land as soon as possible, and "conveyed" to his son Isaac Paxson "for the term of his natural life, afterwards to his children in fee-simple." And, in the selection of lands so to be purchased for his sons Ezeriah and Isaac, *and their respective children*, he directed that his executors should be guided, as far as practicable, by the choice and wishes of his respective sons, and directed the money to be kept at loan on interest, properly secured, until the investment should be made.

The facts on which the questions as to the construction of the devise arise were found by the court. From this finding it appears that the will was made in 1868, and the testator died in 1884, and, at the time of the making of the will, Isaac was living, and had also four children living,—two sons, James and Michael, and two daughters, Almira, intermarried with Alexander L. Woolley, and Nancy, intermarried with John Caulfield; that Isaac, his mother, wife of the testator, and his two daughters, all died intestate, leaving issue that survived the testator, to wit, Pearl Woolley, an infant daughter and only child of Elmira, and Euphemia and Maggie Caulfield, infants and only children of Nancy. The court also found that it will be for the interests of all concerned, Isaac being dead, and no purchase having as yet been made, for the executor to sell the land, and distribute the proceeds according to the terms of the will.

The two sons, James and Michael, who survived the testator, claim that, as the surviving children of their father, Isaac, they are entitled to the entire devise made to his children. On the other hand, it is claimed that the issue of Almira and Nancy each take the share which the mother would have taken, under the devise to the children of Isaac, had she survived the testator.

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If no change had been made by statute in the rule adopted by courts for the construction of a devise to children as a class, the construction claimed by the surviving sons must prevail, however unjust it may seem. Hawk. Wills, c. 7. But a provision of our wills act, introduced in 1840 (Swan St. 1841, p. 999), amended in 1886 (S. & S. 934), and, as amended, embodied in section 5971, Rev. St., reads as follows:

"Sec. 5971. When a devise of real or personal estate is made to any child or other relative of the testator, if such child or other relative shall have been dead at the time of the making of the will, or shall die thereafter, leaving issue surviving the testator, in either case such issue shall take the estate devised in the same manner as the devisee would have done if he had survived the testator; or, if such devisee shall leave no such issue, and the devise be of a residuary estate to him or her, and other child or relative of the testator, the estate devised shall pass to and vest in such residuary devisee surviving the testator, unless a different disposition shall be made or required by the will."

The court below, under the provisions of this statute construed the will in favor of the claim of the issue of Almira and Nancy. On error the circuit court reversed the judgment of the common pleas. We think, however, that the common pleas was right, and that its judgment should have been affirmed.

The rule as to the lapsing of devises and legacies that prevailed before the statute defeated, in most cases, the intention of the testator. He generally made his will with reference to the objects of his bounty as they existed at the time, and as though his will took effect at the date of its execution, not apprehending that a lapse would occur in case any of them should die before himself, unless some express disposition should be made in anticipation of such event. The statute was passed to remedy such disappointments, and should receive a liberal construction, so as to advance the remedy and suppress the mischief. It, among other things, provides that, where a devise is made to a child

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or other relative of the testator who dies before the testator, the issue of such object of his bounty shall take the portion devised to such child or relative. Nothing is more just and comformable to the probable intention of the testator in every instance. The fact that the child or relative is not mentioned by name should not defeat the application of the statute where the language applied to the facts, as they were at the execution of the will, designates a child or relative as an object of the testator's bounty with as much certainty as if it were mentioned by name. At the time the testator made this will, his son Isaac had four children living. They were all adults, and their names well known to him; and the devise that he makes is to Isaac for life, and then *to his children* in fee-simple. This, in the light of the circumstances, must be taken in a distributive sense, and is a devise to each of Isaac's children of the fee-simple in remainder as definitely as if it had been to each by name. For, as observed by Vice-Chancellor MALINS *In re Porter's Trusts*, L. R. 8 Eq. 52, there can be no substantial difference between a gift, for instance, to six children named, and a gift to children simply, there being six. The real objects of the gift are in such cases easily ascertainable by parol testimony.

It is not, however, claimed that the individuals constituting Iasac's children were at the date of the will indefinite, and so incapable of taking as individuals under its provisions, but that the devise was to them as a class, and must be construed, under the rules applicable to such devises, not as a devise to each of the children, but to such of them as should survive the testator. The ground of this rule was that no one can be a devisee or legatee until the will takes effect by the death of the testator. But any argument drawn from this rule proves too much; for, if applied according to its reason, it would abrogate the statute, as no object, however definitely described, can take in this sense until the will ceases by the death of the testator, to be ambulatory. It was upon this ground that a devise to one by

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name, who predeceased the testator, was held to lapse. The fact that in the latter case the extinguished or lapsed legacy went to the residuary legatees, or to the heir where there were no such legatees, while in the case of death of a member of a class it went to the survivors, supplies no reason for excluding the application of the statute where the devise is to a class. It was not because the extinguished legacy or devise was disposed of by the law in one way rather than another that the statute was adopted, but because it did not go to the issue of the deceased devisee, as the testator, in all probabilities, supposed it would. In other words, it was not designed to prevent the failure of a legacy by the death of a legatee before the testator, that were impossible, but to make a new disposition by law of such legacy, where the testator had himself failed to do so, in anticipation of the possible death of any one of the chosen objects of his bounty before himself, where such object was a child or other relative of his. Hence the only question that can arise in the construction of a will under this statute is whether it, as a matter of fact, contains a devise of real or personal estate to a child or other relative of the testator, which such devisee would have taken had he survived the testator. If so, then, by the express language of the statute, the issue of such devisee surviving the testator "shall take the estate devised in the same manner as the devisee would have done if he had survived the testator," unless a different disposition shall be made or required by the will. Now, it is a settled rule that, in a devise to children as a class, each member who survives the testator then takes a vested interest in the devise, Hawk. Wills, 68; and this is so though the devise is not immediate, subject, however, in such case to the liability to be partially divested by children subsequently coming into existence before the period fixed for enjoyment. (Hawk. Wills, 71; Schouler, Wills, § 562). Hence, as, under a devise to a class, each member who survives the testator would independent of the statute, take an aliquot part of the

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devise as a tenant in common with the other survivors, therefore, under the statute, in such case the issue of a deceased member of the class surviving the testator must take what the deceased would have taken had he survived. Any other construction would render the statute nugatory in a large class of cases to which its provisions are by its terms directly applicable.

It seems this is the first case that has been presented to this court requiring a construction of this statute. But statutes similar to our own have been adopted in most, if not all, of the states of the Union. These, while differing in detail, in general provide that if such devisee or legatee die before the testator, leaving issue who survive the testator, such issue shall take the estate as the devisee or legatee would have done in case he survived the testator; and it has generally been held in these states that the statute applies to a devise to a class as well as to a designated individual. *Moore* v. *Dimond*, 5 R. I. 121; *Moore* v. *Weaver*, 16 Gray, 305; *Guitar* v. *Gordon*, 17 Mo. 408; *Jamison* v. *Hay*, 46 Mo. 546; *Cheney* v. *Selman*, 71 Ga. 384; *Yeates* v. *Gill*, 9 B. Mon. 203.

But two cases are found in which a different view seems to have prevailed. *Gross' Estate*, 10 Pa. St. 360; *Young* v. *Robinson*, 11 Gill & J. 328. The only reason assigned in the former case is that "The act was intended to prevent a vested legacy from lapsing by death, which," the court adds, "cannot apply here, as the legacies did not vest at all until the death of the testator." Now it is strange that it did not suggest itself to the mind of so good a court that no legacy vests until the death of the testator, and that such a construction would work a virtual repeal of the statute. Moreover, our statute is general in terms. It is not limited to vested devises only, but applies to any "devise of real or personal estate made to any child or other relative of the testator;" and, whether vested or contingent, it is declared that where such devisee predeceases the testator the surviving issue of such deceased devisee "shall take the estate devised in the same man-

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ner as the devisee would have done if he had survived the testator." The decision in *Young* v. *Robinson* is placed on the ground that the object of their statute is "to provide for such cases of legacies and devises as by the rules of law lapsed or failed to take effect by the death of the devisee or legatee in the life of the testator;"—the statute of Maryland providing that the devise "shall not lapse or fail of taking effect" by the death of the devisee in the life of the testator, but shall have the same effect to transfer the title in the property mentioned as if such devisee had survived the testator, This decision is placed on a mistaken notion of the essential element of a lapsed legacy. Every legacy is said to lapse that fails by reason of the death of the legatee in the life of the testator. Bro. Law Dic. "Lapse," 304. The disposition made by the law, in the absence of any statutory provision, is not material. It went to the residuary legatees or devisees, if there were such, and if not it went to the heir; or, where the failure occurred in a devise to a class by the death of one of the members, it went to the survivors. But whether it went to residuary legatees, or to the heir, or to the survivors of a class, did not affect the essential character of the extinguished gift. It was, properly speaking, a lapsed legacy or devise in either case. The statute of Kentucky, like that of Maryland, also contains the negative clause, "shall not lapse;" and in *Yeates* v. *Gill*, *supra*, it was contended that it did not apply to a devise to "children," as in such case there can be no lapse so long as there are survivors of the class. But the court rejected this view, and said: "We are of opinion that this statute was intended to promote equality in the distribution of estates, and to subserve the probable intention of testators under a change of circumstances not expressly provided for, only (as might be presumed) because express provision was not understood to be necessary; and it should be construed liberally for the effectuation of those objects." It will be observed that our statute contains no such negative words. It simply affirms that the issue of such deceased devisee surviving

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the testator shall take what the deceased would have taken had he survived; and, as before observed, under our statute the construction is solved by determining whether, in that event, he would have taken as a devisee under the will.

It is also argued that the issue cannot take because the devise to the children of Isaac is, as claimed, a contingent one,—that is to say, depends not only upon their surviving the testator, but also the wife of the testator, to whom was given a life-estate in the whole property, and to the determination of which estate the gift to the father for life, as well as the remainder to the children, was postponed. To this it may be answered: (1) That the vesting in interest of the devise is not made to depend by the will upon any condition whatever. The devise is absolute—no adverbs of time nor words of survivorship being used, and therefore must be construed as a gift vesting in interest, if not in possession, at the death of the testator. Hawk. Wills, 71; *Linton* v. *Laycock*, 33 Ohio St. 128; Schouler, Wills, §§ 560, 562. (2) As heretofore shown the statute applies to contingent gifts as well as to vested ones. And (3) that by the death of Isaac, the tenant for life, and of his mother, in the lifetime of the testator, both of these prior life-estates were eliminated from the will, and the devise to Isaac's children was thereby accelerated so as to take effect at the death of the testator, not only as an estate in interest, but also in possession. So that, if the inchoate devise was contingent at the date of the will by reason of the creation of these life-estates, it ceased to be such before the death of the testator. By the extinction of these life-estates the devise to Isaac's children took effect at the death of the testator as an immediate devise to the survivors and the issue of such as had deceased, in the same manner and with like effect as if no inchoate prior estates had been created at the date of the will. 2 Williams, Ex'rs, 1219. "If money, from whatever source arising, be directed to be laid out in the purchase of land to be settled in any manner, equity will regard the persons on whom

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the lands are to be settled as already in the possession of their estates." Will, Real Pr. 164.

The fact that, before the death of the testator, his wife and his son Isaac had died, so that there were no prior intervening estates postponing in any way the bequest to Isaac's children, renders the decisions in *Richey* v. *Johnson*, 30 Ohio St. 288, and in *Hamilton* v. *Rodgers*, 38 Ohio St. 242, on which much reliance seems to be placed by counsel for defendant in error, wholly inapplicable here, and their examination unnecessary.

It is also claimed that the form of the bequest to his daughter Julia A. Stroop, and to the son of his daughter Ivey Varner, indicate an intention on the part of the testator that the survivor only of the children of Isaac should take; and so as to his son Ezeriah's. But we think that the form of the former devises can shed very little light upon his intention as to the latter. In the first two instances the bequest to each, as well as to the heirs of each, is necessarily contingent until the time for distribution arrives. For example, the designated share is to be paid Julia "if she be living, or to her heirs if she be dead, at the time the same is ready to be paid," clearly indicating that "heirs" are to take by substitution, should the mother die before the time of payment arrives. If she survives that time, she takes absolutely, and the conditional gift over to the heirs is gone. In the latter instances the gift is to each son for life, and then to his children in fee-simple, without any condition as to either side. The death of the father simply accelerates the enjoyment of, but does not create or vest, the devise to the children.

Judgment of the circuit court reversed and that of the common pleas affirmed.

OWENS, C. J., and WILLIAMS, J., dissent.

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VROOMAN *vs.* POWERS.

(47 Ohio State, 191.)

VERBAL WILLS—ATTESTATION—WITNESSES.

Where a verbal will is reduced to writing and subscribed by two witnesses one of whom is a legatee thereunder, and the other is his wife, the husband is not a competent, disinterested witness, within the meaning of section 5991 of the Revised Statutes, and the will is invalid.

The two witnesses to a verbal will must be competent, disinterested witnesses at the time of their attestation, and their disqualification as witnesses by reason of interest under the will, cannot be removed by a renunciation of such interest at the time the will is admitted to probate, or at the trial of an issue to contest the validity of the will. Section 5925 of the Revised Statutes, as to the effect of a witness being a devisee or legatee under the will, is not applicable to verbal wills.

ERROR to Circuit Court, Cuyahoga County.

Alvord, Alvord & Baptiste, for plaintiff in error.

Robinson & Rogers and *H. C. White,* for defendant in error.

DICKMAN, J. Mary A. Powers, the wife of the defendant in error, George O Powers, died on the 13th day of December, 1881, leaving issue one child, Orris Irving Powers, who thereafter, and before this suit was begun, died, aged six months. It was claimed that Mary A. Powers, in her last sickness, made a verbal will, which was, on the 19th day of December, 1881, reduced to writing, and subscribed by Orris D. Vrooman and his wife, Emma J. Vrooman, as witnesses. The alleged verbal will was presented to and admitted to probate by the Probate Court of Cuyahoga County. By the terms of the will, Orris D. Vrooman, Joseph Vrooman, Albert K. Vrooman, and Adiran Vrooman, the plaintiffs in error, brothers of Mary A. Powers, and Orris Irving Powers, are named as the several legatees of Mary A. Powers. Suit was brought by George O. Powers in the court of common pleas, against the plain-

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tiffs in error, to set aside the will, on the ground, among others, that it was not subscribed by two competent, disinterested witnesses. The case was tried in the court of common pleas in May, 1884, and by verdict and judgment of the court the will was set aside. The defendants appealed, and on Feb. 15, 1887, the case was tried in the circuit court, and it was found by the verdict and judgment rendered therein that the paper purporting to be the last will of Mary A. Powers was not her last will. During the trial in the circuit court, a written renunciation of all interest under the will, made and signed February 13, 1887, by Orris D. Vrooman and Emma J. Vrooman, the two witnesses to the alleged verbal will, was filed in that court, which renunciation, on being offered in evidence, was ruled out by the court.

The court, among other matters, charged the jury as follows: "That, if they should find from the evidence that one of said witnesses to said will, Orris D. Vrooman, was the brother of the testatrix, and one of the residuary legatees mentioned in said alleged will, and that said Emma J. Vrooman was at the time the wife of the said Orris D. Vrooman, the said witnesses to said will were not, within the meaning of the statute of Ohio, competent, disinterested witnesses to said will, and because of that fact said will would not be the valid verbal will of the said Mary A. Powers."

It is contended in behalf of the plaintiffs in error that the circuit court erred,—first, in charging the jury that Orris D. Vrooman and Emma J. Vrooman, under the conditions above stated, would not be competent and disinterested witnesses, within the meaning of the statute; and, second, in refusing to allow the paper containing their renunciation of interest to be put in evidence.

1. It is provided by section 5991 of the Revised Statutes that "a verbal will, made in the last sickness, shall be valid in respect to personal property, if reduced to writing, and subscribed by two competent, disinterested witnesses, within ten days after the speaking of

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the testamentary words, and if it be proved by said witnesses that the testator was of sound mind and memory, and not under any restraint, and called upon some person present at the time the testamentary words were spoken to bear testimony to said disposition as his will." The statute requires that *both* the witnesses shall be competent and disinterested, and not one only. In our judgment, Orris D. Vrooman did not meet the requirement of the statute as to competency and disinterestedness. He had a sufficiently immediate, beneficial interest in the will to disqualify him from becoming a subscribing witness thereto. The alleged will provided that a certain sum of money in the hands of her brother, Orris D. Vrooman, belonging to the testatrix, if not used for her sickness and incidental expenses, should be placed where her son could have it on arriving at the age of 21 years; and that, if he died before the age of 21 years, the money should go to her brothers; and that, whatever funds were to come from her mother's estate were to go in the same manner. One of the witnesses, therefore, being incompetent and disqualified by reason of interest, there was not a compliance with the statutory requirement that the *two witnesses* to the verbal will should be competent and disinterested, and the will, in consequence, cannot be held to be valid. We find no error in the charge of the court.

It is urged, however, that if there was a disqualification of interest in one or both of the witnesses, it was removed by the operation of section 5925 of the Revised Statutes, which provides that, "if a devise or bequest is given to a person who is a witness to the will, and the will cannot otherwise be proved than by the testimony of such witness, the devise or bequest shall be void, and the witness shall be competent to give testimony of the execution of the will, in like manner as if such devise or bequest had not been made." This section, when considered in connection with the preceding sections of the chapter, including section 5916, is clearly applicable only to duly executed written wills. Section 5916 requires that "every last will and testa-

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ment (except nuncupative wills, hereinafter provided for) shall be in writing, and signed at the end thereof by the party making the same * * and shall be attested and subscribed in the presence of such party by two or more competent witnesses," etc. The sections immediately following, embracing section 5925, are so connected by obvious reference to a will in writing as to preclude the idea of applying the last-mentioned section to nuncupative wills, which, by the statute, are assigned to a separate and distinct class, and are subject to different requisites and conditions. Section 5925, in providing that "the witness shall be competent to give testimony in the execution of the will," evidently refers to the full legal formalities of a signature by the testator, and in attestation by competent witnesses who subscribe in the testator's presence, and not, as in a nuncupative will, to the testator's speaking testamentary words in his last sickness, which are to be reduced to writing, and subscribed by competent disinterested witnesses, within ten days after the words are spoken.

2. The renouncement and release by Orris D. Vrooman of all right and interest was not filed until more than five years after the verbal will is alleged to have been made. Such a release did not remove his disqualifications as a witness. The statute contemplates the verbal will as made in the last sickness. Within ten days after the speaking of the testamentary words, the will must be reduced to writing, and subscribed by two witnesses, who are then competent and disinterested. The rule, it is said, which reason should now pronounce the universal one, is that the competency of witnesses, like that of the testator, is tested by one status at the time when the will was executed. Schouler, Wills, § 351. In *Patten* v. *Tallman*, 27 Me. 27, the court say: "The competency of an attesting witness is not to be determined upon the state of facts existing at the time when the will is presented for probate, but upon those existing at the time of the attestation." In *Morton* v. *Ingram*, 11 Ired. 368, it was held that a person

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named as executor is not competent as an attesting witness to a will of personalty, and that his subsequent renunciation and release will not make him so, and that he must be disinterested at the time of attestation. In *Huse* v. *McConnell*, 2 Jones (N. C.) 455, the court remark: "It is well settled law that an attesting witness to a will must be competent at the time of attestation, and that no subsequent release, where the objection is one of interest, can restore competency."

In *Workman* v. *Dominick*, 3 Strob. 589, it was held that "credible" means competent, and the competency of the witness must be referred to the time of attestation. FROST, J., said: "This point is settled. It is affirmed by all the elementary writers. * * * If the witnesses do not possess at the time of the execution of the will, the quality required, it cannot afterwards be supplied. If any of them be not then credible, by reason of a benefit he may take by the instrument, he cannot be made credible by a future release. * * * The will would be absolutely in the power of the witness. If he consents to release, the will is established; if he refuses, the will is annulled. It is in his power to set up the estate to auction between the legatees and next of kin, and sell it to the highest bidder; and thus being first bribed by an interest in the will to make it, he is open to another bribe to vacate it."

See *Stewart* v. *Harriman*, 56 N. H. 25; *Hawes* v. *Humphrey*, 9 Pick. 350; *Higgins* v. *Carlton*, 28 Md. 115; *Pease* v. *Allis*, 110 Mass. 157; *Allison* v. *Allison*, 4 Hawks, 141; *Tucker* v. *Tucker*, 5 Ired. 161; *Greenl. Ev.* § 691. The rule laid down in the above citations acquires additional force and significance when applied to the attestation and establishment of verbal wills. The rule, it is true, in its application to wills in writing, is controlled by section 5925 of the Revised Statutes, but that section as we have before observed, *is not applicable* to nuncupative wills.

Judgment affirmed.

See, also, Carroll v. Bonham, 5 Am. Prob. Rep. 389, and the note.

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STATE *ex rel.* SANDERSON *vs.* MANN, COUNTY JUDGE.

(76 Wisconsin, 469.)

TAXATION OF ESTATES—CONSTITUTIONAL LAW.

Laws Wis. 1889. c. 176, requiring the payment of a percentage on all estates of decedents of more than $3,000 in counties of over 150,000 inhabitants to the county treasurer, for the use of the county, as a condition precedent to their settlement in probate proceedings levies a tax, and is void under Const. Wis. art. 4, §§ 31, 32, providing that taxes must be assessed and collected by laws "uniform in their operation throughout the state," and "not by special or private laws." TAYLOR, J., dissenting. Such tax cannot be upheld as a tax on "civil suits," under Const. Wis. art. 7, § 18, providing that "the legislature shall impose a tax on all civil suits * * * which shall constitute a fund to be applied towards the payment of the salary of judges," since the tax must be paid to the county treasurer, for the use of the county. The settlement of estates in the probate court is not a "civil suit" within the meaning of the constitution.

APPEAL from Circuit Court for Milwaukee County. November 26, 1889, the relator filed his petition in the circuit court, for Milwaukee county, stating, in effect, that May 20, 1889, Edward Sanderson, then a resident of said county, died intestate, leaving him surviving a widow and four children, including, the said relator, his heirs-at-law; that said intestate was the owner, at the time of his death, of real estate in said county of the value of $122,900 and of real estate situate elsewhere of the value of $2,050 and of personal property of the value of $506,990.08, amounting in the aggregate to $631,949.08; that said deceased then owed certain sums of money to various parties; that such proceedings were had in said county court in probate, that July 2, 1889, said widow and said relator and one William Sanderson were duly appointed administrators of said estate, and thereupon duly qualified as such, and letters of administration therein were thereupon duly issued to them under the seal of said court, and that they have ever since been, and now are, acting as such administrators; that October 2, 1889, said administrators duly make a true inventory of all said real and personal property, and duly offered to return the

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same to said court, but said court declined to receive the same; and thereafter the said property was duly appraised by the appraisers appointed by said county court for that purpose, and the appraisal thereof was of the value stated, and said inventory was duly verified by said administrators, and said appraisal duly certified by such appraisers, and by said appraisers delivered to said administrators; that said respondent was, at all the times mentioned, and has been and is the county judge of said county, duly qualified and acting as such; that November 25, 1889, said petitioner caused said inventory and appraisals to be presented to said county court, to be filed and approved, but said court, by the judge thereof, then and there refused to accept proof of, or file the same, unless and until said administrators would first pay to the county treasurer of said county, for the use thereof, the sum of $2,631.95, according to the provisions of chapter 176, Laws 1889; that no objection was or is made by said county judge to receiving and filing and allowing said inventory, except the failure to pay the said sum last named; that said administrators are by law and their letters of administration required to return said inventory into said county court, and are ready and willing on their part to do everything necessary to duly settle said estate, but are unable to do so by reason of said refusal of said court to accept, allow and file said inventory and appraisal; that said sum last named is grossly exorbitant, and out of proportion for said estate, to pay as compensation for the services of the judge of said court or the clerks in his office, in the settlement of said estate; that such requirement by the county judge to so pay such sum is based wholly on the provisions of said chapter 176, and that said petitioner is advised and believes that said act is unconstitutional and void, and that there is no law requiring any payment whatever, that said refusal to file and allow said inventory and appraisal will work great injury to the petitioner and the other parties interested in said estate, and that the petitioner has no remedy at law or otherwise, un-

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less the writ of *mandamus* issue as herein prayed for, wherefore said petitioner prays that the alternative writ of *mandamus* may issue out of and under the seal of said circuit court directing and commanding said John E. Mann, county judge as aforesaid, to proceed at once to accept proof and file said inventory and appraisal, and to thereafter proceed to the allowance of any account that may be filed by said administrators, and to the settlement of said estate according to law, and without the payment of said $2,631.95, or any sum whatever, or that he may show cause to the contrary thereof before said circuit court, at a time and place to be named by said court; that

November 26, 1889, such alternative writ was duly issued by said circuit court, and on the same day served on the said John E Mann, as county judge, and thereupon filed in said circuit court. Thereupon, and on December 3, 1889, the district attorney of said county moved the circuit court to quash said alternative writ, for the reason that the relator herein, as appeared from the relation, had not complied with the provisions of chapter 176, Laws 1889; that upon the hearing of the respective counsel upon said motion it was ordered by the said circuit court that said motion to quash be, and the same was thereby, sustained. From the order so made the relator appeals.

Van Dyke & Van Dyke, for the relator.

John Toohey, for respondent.

CASSODAY, J., The Hon. Edward Sanderson, residing at Milwaukee, died intestate May 20, 1889, leaving an estate valued at $631,949.08, consisting mostly of personal property. Ch. 176, Laws 1889, went into effect a short time prior to his death, and applied to the administration of estates in any county having a population of over 150,000, except that estates of $3,000 or less are exempt from its provisions. Of course, Milwaukee county is the only county in the state to which the act is applicable. By

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the terms of that act the administrators of the estate in question are required to "pay to the *county treasurer* of such county, *for the use thereof*, a sum equal to one-half of one per cent." on $500,000 of the appraised value of such estate, and one-tenth of one per cent. of such value on the balance of said estate; that is to say, $2,631.95 in all. The act expressly requires that such sum shall be paid at the time of the return and approval of the inventory, and that no account of any executor or administrator shall be allowed without proof of such payment, and that the same shall constitute a part of the expense of administration. The only deduction from the gross valuation of such estate, provided for in the act, is the amount of existing specific liens. The act expressly repeals all acts and parts of acts inconsistent therewith. In obedience to that act the county judge refused to accept, approve, or file the inventory and appraisal of said estate unless and until said administrators shall first pay to the county treasurer, for the use of said county, said sum of $2,631.95. The relator denies the validity of that act, and has instituted this suit to compel the county judge to proceed with the settlement of said estate without the payment of the sum so exacted as a condition precedent.

1. It is claimed by the learned district attorney, that the exaction in question is essentially a probate fee, or in lieu of such a fee. The title of the act asserts that it is "in lieu of fees in all counties" of the population named. The repealing clause of the act, in addition to what is stated above, purports to repeal "all that part of section 2483, Rev. St. 1878, which provides for the payment of fees to the county treasurer in settlement of estates or guardianship." The so-called fees provided for in that section ranged from twenty to seventy-five dollars, according to the valuation of the estate, and were payable to the county treasurer, for the use of the county, and applied solely to Milwaukee county. Such charge was first authorized by section 4, c. 121, Laws 1868, but was expressly repealed by chapter 40, Laws 1872. It was first applied to Milwau-

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kee county by section 4, c. 98, Laws 1877, and then so incorporated into section 2483, Rev. St., and then continued by chapter 262, Laws 1880. Such charges have been treated by the legislature as something different from probate fees. Thus chapter 121, Laws 1868, first authorizing such charges, expressly prohibited the several county judges "from taking or receiving, either directly or indirectly, any fees whatever for their official services in the administration of the estates of deceased persons," and provided for paying such judges a salary. These provisions were incorporated into sections 2454, 2455, R. S. Ch. 183, Laws of 1880, and expressly prohibited both the county judge of Milwaukee county and his assistant register of probate from receiving any fees of office or other compensation than his salary.

A probate fee is manifestly a reward or compensation to a county judge or judge or register of probate for services rendered or to be rendered. Obviously, no such fee was required by law in Milwaukee county at the time of the passage of chapter 176, Laws 1889, except for certified copies of records and papers, as prescribed by sec. 2483, R. S. The same was true respecting other counties in the state. The payment required by that act, therefore, could not have been "in lieu of fees" of such judges or register, as might be inferred from the title of the act. On the contrary, it was manifestly in lieu of the charge or exaction of from twenty to seventy-five dollars, according to the valuation of the estate, thus required to be paid in Milwaukee county. This is made plain by the act itself, which requires such payment to be made "to the county treasurer of such county, *for the use thereof.*" The law nowhere prescribes the object or use to which the money so paid is to be applied. There seems to be nothing to prevent its being expended for any legitimate county purposes or public improvements. Besides the amount of this exaction is in no way dependent upon the amount or value of such services of the judge or register of probate, but depends entirely upon such valuation or ap-

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praisal of the estate. Some small estates may be so complicated as to require very much more services from such judge or register than many large estates. Compensation for services must necessarily be graduated by the amount, quality, and character of the services; but here the amount exacted bears no relation to such services, and may be used for entirely other purposes. In fact the amount exacted in the case before us, if regarded as a probate fee for services rendered or to be rendered in the case, is so large as to shock the good sense of everybody.

We must hold that the exaction in question is not a probate fee, nor in lieu of, nor equivalent to, a probate fee. It is nothing less than a charge imposed by the legislature as a condition precedent to allowing the county court to proceed with the administration of this estate. Such charge is necessarily a burden so imposed upon such administrators or such estate, or both, to raise money for public purposes. This brings it within a well-recognized definition of a tax. Blackw. Tax Titles, § 10; Cooley, Tax'n, 1. Even where, under the police power, licenses are exacted as a condition precedent for the doing of a certain kind of business otherwise lawful, for the purpose of raising revenue, it is essentially a tax. Cooley, Tax'n, 572, 597; Tied Lim. P. P. 278-289. "The granting of a license, therefore," said CHASE, C. J., speaking for the court, "must be regarded as nothing more than a mere form of imposing a tax." *License Tax Cases*, 5 Wall. 471. In that case it was held that "the requirement of payment for such licenses is only a mode of imposing taxes on the licensed business, and the prohibition, under penalties, against carrying on the business without license is only a mode of enforcing the payment of such taxes." It is very obvious that the charge imposed by the act in question, is essentially a tax.

2. This brings us to the question whether the validity of that act can be maintained on the theory that such exaction is a tax. The constitution provides that "the legislature shall impose a tax on *all civil suits*

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commenced or prosecuted in the municipal, inferior, or circuit courts, which shall constitute a fund to be applied towards the payment of the salary of judges." There are several reasons why the tax in question cannot be maintained under this section. The fund thereby raised is not restricted to the payment of the salary of judges. County courts must undoubtedly be regarded as inferior courts within the meaning of the section, for another section of the constitution empowered the legislature "to abolish the office of judge of probate in any county, and to confer probate powers upon such *inferior courts* as may be established in said county." Sec. 14, art. VII. But section 18 of that article, above quoted, requires such tax to be imposed "on all civil suits commenced or prosecuted" in any and all of the courts in the state named in the section. Such a tax has been imposed by general statutes from the beginning. Section 2632, R. S. The act in question applies only to Milwaukee county. But another and a conclusive reason why the tax here imposed cannot be justified under the section of the constitution quoted is that the settlement of estates in courts having probate jurisdiction is essentially proceedings *in rem*, and not "civil suits commenced and prosecuted" within the meaning of the constitution. It is upon this theory that the federal courts have uniformly disclaimed jurisdiction in probate matters; since such jurisdiction is not conferred by the words: "The judicial power shall extend to all cases *in law and equity* arising," etc. Sec. 2, art. 3, Const. U. S. If, then, the legislature had the power to impose the tax in question, it was by virtue of its general taxing power, and not under the special grant of power conferred by the section quoted.

3. The general powers of taxation reserved to and possessed by the state are expressly limited in the modes of their exercise. The constitution expressly declares that "the rule of taxation shall be uniform, and taxes shall be levied upon such property as the legislature shall prescribe." Sec. 1, art. VIII: Under this section

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the legislature undoubtedly have the power to prescribe the property to be taxed, and the rule by which it must be taxed, subject, however, to the limitation that such rule must be uniform. *Wis. Cent. R. Co.* v. *Taylor Co.*, 52 Wis. 37, 8 N. W. Rep. 833. Counsel seem to think that the rulings in that case justified an arbitrary classification of inclusion and exclusion, even where there are no rational grounds for distinction in the character, use, productiveness or circumstances of the property or subjects taxed. A thorough acquaintance with that case, however, will not justify such conclusion. In that case the lands exempted had been granted by the United States to the state, and by it held in trust for the purpose of building the proposed line of railroad belonging to the plaintiff, and hence were not subject to taxation, even in the place limits, except as fast as they were actually earned by the construction of the road, nor then until certified by the state authorities. But none of such lands as were situated in the indemnity limits, even though so earned and so certified to, became taxable until actually selected, and such selections actually approved by the secretary of the interior. *State, ex rel. Belle* v. *Harshaw, ante*, 308. It was only lands granted for such a purpose, and acquired in that way, and in furtherance of the object of such grant, and in the execution of such trust, that it was held, in the case referred to, might be exempted from taxation for a term of years, and afterwards such exemption extended. Since the case of *Wis. Cent. R. Co.* v. *Taylor Co., supra*, numerous decisions have been made by courts of high authority, sanctioning the reasonable classifications of property for the purposes of taxation, and holding that the same were not in violation of the rule of uniformity. Among such cases are the following: *Kentucky R. Tax Cases*, 115 U. S. 322; *Gibbons* v. *District of Columbia*, 116 U. S. 404; *Davenport Bank* v. *Davenport Board*, 123 U. S. 83. *Banger's Appeal*, 109 Pa. St. 79; *Lehigh & R. Co.* v. *Comm.* 18 Atl. Rep. (Pa.) 410; *State* v. *Underground Cable Co.*, 18 Atl. Rep. (N. J.) 581; *State* v. *Richards*, 18 Atl. Rep. (N. J.)

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582; *State Board* v. *Cent. R. Co.*, 48 N. J. Law, 146; *People ex rel. Iron S. M. Co.* v. *Henderson*, 12 Cols. 369; *St. Louis* v. *Freivogel*, 95 Mo. 533, 8 S. W. Rep. 715.

It is claimed that the exaction in question is nothing more than a succession tax, and as such, constitutes a distinct class, and hence is not in violation of the rule of uniformity mentioned. Such a tax is essentially a tax upon the transmission of estates by devise, bequest, or descent, and not, properly speaking, a tax upon the property constituting the estate before the same is thus transmitted. The view we have taken of this case renders it unnecessary to determine whether such a tax may lawfully be imposed under our constitution. Upon the death of any person, his property, not exempt, at once becomes chargeable with the payment of all his debts, whether he dies testate or intestate. *Union Nat. Bank* v. *Hicks*, 67 Wis. 191, 30 N. W. Rep. 234. Of course, the rights of heirs, devisees, and legatees, in a certain sense, become vested at the death of such testate or intestate. The administration of estates is to preserve the same until the claims of creditors are ascertained and provided for, when the residue may be effectually transmitted to the respective parties entitled. A succession tax would necessarily be imposed upon the respective parties thus succeeding to such residue. *Commonwealth's Appeal*, 127 Pa. St. 438, 17 Atl. Rep. 1094; *Mason* v. *Sargent*, 104 U. S. 689. But the tax in question is not upon such succession, but upon the whole estate at its appraised valuation, regardless of whether it is solvent or insolvent. In case of an insolvent estate nothing would be left after the payment of debts for transmission, and in most estates there is likely to be sufficient debts to reduce the amount of such transmission far below the amount of such valuation. Besides, the amount of such tax is graduated by the amount of such appraisal, and is to be paid by the executors or administrators before or at the time of filing such appraisal, notwithstanding they may only be interested as such officials, and never succeed to any of such estate. Manifestly the burden imposed is not a

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succession tax, but a tax upon the whole estate, regardless of whether it is solvent or insolvent.

4. Can it be sustained as a tax upon the estate? A short time prior to Mr. Sanderson's death his property was assessed under the general statutes as of the 1st day of May, 1889. Section 1033, S. & B. Ann. St. If the exaction in question is to be maintained, then his estate was subject to double taxation for the year 1889, and each tax was imposed by a different rule. Besides, the act in question exempted from such taxation all such estates as did not exceed $3,000 in value. Were we to assume that the act, as applying to Milwaukee county alone, could otherwise be maintained, yet it would be a serious question whether it could be sustained as a uniform rule of taxation under the clause of the constitution quoted. That question will not here be determined.

5. As indicated, the act in question imposes a tax for general purposes, and applies only to Milwaukee county. As thus limited can it be sustained? A similar question was presented in *Murphy* v. *Hall*, 68 Wis. 212, 31 N. W. Rep. 754, but was passed over with the remark that "the gravity of such a question suggests the propriety of reserving its determination until imperative duty requires." It was thus mentioned for the very purpose of calling attention to the mischief which might result from that class of legislation. Obviously, if the action can be sustained as to any county having a population exceeding 150,000, then an act might be sustained as to any counties having a population of $1,000 or less, or any counties having between 1,000 and 2,000 population, and so on, for each additional 1,000. Thus we might have nearly as many systems of taxation as we have counties in the state. The mischief thus indicated had been fully demonstrated more than 20 years ago. The amendment of 1871 to article IV of the constitution, among other things, provides: "Sec. 31. *The legislature is prohibited* from enacting any special or private laws. * * * 6th. *For assessment or collection of taxes*, or for ex-

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tending the time for the collection thereof. * * * Sec. 32. The legislature shall provide *general laws* for the transaction of *any* business that may be prohibited by secton 31 of this article, *and all such laws shall be uniform in their operation throughout the state.*" These provisions, in effect, declare that the legislature is prohibited from enacting any special or private laws for the assessment or collection of taxes, or for extending the time for the collection thereof, in Milwaukee county, or any limited number of counties in the state, less than the whole, but the legislature shall provide general laws for such assessment and collection, "*and all such laws shall be uniform in their operation throughout the state.*" Manifestly the act for the imposition and collection of the tax in question is not uniform in its operation throughout the state, but, in direct violation of these provisions of the constitution, is not only limited in its operation to Milwaukee county, but is further limited to a certain class of estates in that county. For these obvious reasons we must hold that the act in question is unconstitutional and void. We are pleased to note that two courts of high authority have each recently come to the same conclusion in respect to a similar enactment. *State ex rel. Davidson* v. *Gorman*, 40 Minn. 232, 41 N. W. Rep. 948; *In re Ruan St.* (Pa.) 19 Atl. Rep. 219.

6. The Minnesota case cited also holds that such act is in violation of a provision of their constitution, similar to ours, which declares that "every person * * * ought to obtain justice freely and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws." Sec. 9, art. 1. The act in question purports to close the door of the county court against these administrators and this estate, unless they first advance and pay the amount exacted. This looks very much like purchasing the privilege of going into the county court for the settlement of this estate; but it is unnecessary here to determine the question.

By the Court.—The order and judgment of the cir-

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cuit court is reversed, and the cause is remanded with direction to render judgment for the relator, awarding a peremptory writ of *mandamus*, as prayed in the petition.

TAYLOR, J. dissents.

ROSTEL *vs.* MORAT.

(19 Oregon, 181.)

ADMINISTRATORS' ACCOUNTS—ALLOWANCE—APPEAL.

It is the duty of every executor or administrator, within six months after notice of his appointment, and every six months thereafter until the estate is settled, to file a semi-annual account; and the county court must, at the first term after any such account is filed, ascertain and determine if the estate be sufficient to satisfy the claims presented and allowed within the first six months, or any succeeding six months thereafter, after paying the funeral charges and expenses of administration, and, if so, it shall so order and direct; but, if the estate be insufficient for that purpose, it shall ascertain what per centum it is sufficient to satisfy, and direct accordingly. By paying claims in advance of an order by the court, an executor or administrator takes the risk of securing the approval of his acts by the court when his accounts and vouchers shall be presented. If the final account of an executor or administrator be disapproved by the court, he may either appeal from the decree disallowing the same, or file another account, which shall meet the objections of the court. A decree for the payment of money in probate proceedings cannot be enforced as for a contempt. The proper process is an execution.

APPEAL from Jackson county; L. R. WEBSTER, Judge. This controversy has arisen in the course of the settlement of the estate of Julius Raspot, deceased. The defendant, Raphael Morat, is the executor of the last will of said deceased, and the plaintiff is endeavoring to secure the payment of a claim in the form of a judgment which he obtained before justice of the peace in Jackson county against said Julius Raspot in his lifetime. The cause was transferred from the county

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court of Jackson county to the circuit court of that county, for the reason that the newly-elected judge of that county was directly interested as counsel for one of the litigants.

Raspot died on the 7th of March, 1884. On the 23rd day of August, 1884, the will was duly proven and admitted to probate, and the defendant qualified as executor, and entered upon the duties of his trust. The inventory was not filed until the 23rd day of October, 1884, by which it appears the appraised value of the property of the estate was $222.92. On the 4th of March, 1885, the executor filed a final account. On March 21, 1886, he filed another final account; and on the 5th day of July, 1887, he made "a full and final statement of his proceedings."

To each of these accounts the respondent filed objections, and said accounts were disallowed by the court; but each account showed disbursements enough to absorb the estate, if the claims paid were such as the executor had the right to pay in the order in which they were paid.

On the 7th day of September the court made an order adjudging that the executor pay Rostel's claim forthwith, or that he show cause at the next term of court why he failed or refused to pay it. On the 5th day of October, 1886, the executor served and filed a notice of appeal from said order; but no undertaking on appeal was executed, and the same was not prosecuted.

Afterwards, on the 2nd day of May, 1887, C. B. Rostel filed in said court a petition for a citation requiring the executor to appear and show cause why he did not pay petitioner's claim theretofore allowed and ordered paid. The executor, in answer to this citation, undertook to show cause by filing one of his final settlements.

There was a hearing on this account on the 6th day of July, 1887, at which the court refused to set aside its order of September 7, 1886, and directed the executor forthwith to comply with the same.

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Finally, on the 30th of June, 1888, the executor still failing to comply with said order by paying Rostel's claim, the court awarded a warrant for his arrest, and committed him to the jail of Jackson county, to be "there kept in close confinement and custody, until he submits, and obeys the orders of this court."

It was admitted on the argument, though it does not appear from this record, that Morat was afterwards discharged from said confinement, by the circuit judge of the first district, on *habeas corpus*.

When this cause reached the circuit court, it appears to have been tried by the court as to whether the executor should pay Rostel's claim, being the same, precisely, which had been previously tried and determined by the county court; and said circuit court ordered him to pay it within 15 days. It is from this order or judgment that this appeal is taken.

C. W. Kahler, for appellant.

H. K. Hanna, for respondent.

STRAHAN, J. The proceedings in this cause seem to be so irregular, as well as prolix, that it is difficult to determine just what the rights of the parties really are. There have been an unnecessary number of papers filed, many of which were copied into the journal in the county court, when there was no occasion for it; and where the record ought to be full and explicit, it is frequently wanting in particularity.

The appellant's contention is that the county court is a court of record, Art. VII, Section 1, Constitution, and that whatever judgment or decrees it may enter ought to be justified by the record in the particular case; that probate jurisdiction is conferred on the court by the constitution, Art. 7, § 12, and by the Code, § 895, and the manner in which it shall be exercised is fixed by the various provisions of the law applicable to the particular subject; that section 1170, Hill's Code, makes it the duty of an executor or administrator, within six

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months from the date of the notice of his appointment, and every six months thereafter until the administration is completed, and he is discharged from his trust, to render a verified account, and file the same with the clerk, showing the enumerated particulars in said section mentioned; and that section 1172 makes it the duty of the court, at the first term after the filing of the first semi-annual account, thereafter to ascertain and determine if the estate be sufficient to satisfy the claims presented and allowed by the executor or administrator within the first six months, or any succeeding six months thereafter, after paying the funeral charges and expenses of administration, and, if so, shall so order and direct; but, if the estate be insufficient for that purpose, it shall ascertain what per centum of such claims it is sufficient to satisfy and order and direct accordingly. These sections prescribe the duty of the executor or administrator, and the court as well.

The executor, in this case, filed no semi-annual accounts. Each was a final account. He also took it upon himself to pay claims without any order or directions from the court whatever; and, while it is believed that this is and has been the usual custom among executors and administrators in this State, it is not the course prescribed by law. By paying claims in advance of an order by the court, the executor or administrator simply takes the risk of securing the court's approval of his action when his accounts and vouchers shall be presented; and this Morat failed to do. On the contrary, the court disapproved of every account filed by him, and made an order requiring him to pay Rostel's claim in full. The executor published two notices of the hearing of each of his final accounts, one of which notices was given by order of the court.

On each of these occasions when his accounts were disallowed by the court, I think the executor might either have appealed from the order of disallowance, or he might have filed another account, by way of amendment, which would have met the views of the court. He saw proper to adopt the latter course, but

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was unable to obtain the court's sanction to his proceedings.

Having said this much in reference to the proceedings in the county court, we come to an examination of the action of the circuit court which resulted adversely to the executor. Amongst other things the circuit court found that the said executor was chargeable, on account of the assets of said estate which came into his hands, with the sum of $109.83, which is properly applicable to the payment of said claim, and should be applied in pursuance of the judgment of the county court heretofore rendered and entered in this behalf. Whether this finding is correct, it is impossible for us to determine in the present state of this record. Its correctness depends altogether on whether or not the defendant was properly charged by the court with the par value of the bank-stock, or the amount for which he reported he sold it, and whether or not the credit side of the account is correct; and that depends on whether or not the credits which he claims ought to have been allowed. There is a dispute, and considerable uncertainty, about it. The court below might have heard evidence on this subject which we are not permitted to hear, nor have we any satisfactory way of determining the reasonableness of many of these charges.

While we are not entirely satisfied that the judgment appealed from is right, we are unable to say affirmatively that it is wrong; and, inasmuch as the defendant, by failing to observe the proper course of procedure in the county court, has contributed very much to produce this uncertainty, we do not think we are called on to interfere.

If the defendant had promptly filed his semi-annual account at the end of six months from the date of the notice of his appointment, and each six months thereafter, and had paid no claims until the court determined the order of their priority, and then paid them upon the order of the court, its orders would have fully and completely protected him against any claim not thus ordered to be paid.

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Though not strictly necessary, I think this case ought not to be dismissed without a word respecting the manner in which the order or decree may be enforced against the defendant. Section 1078, Hill's Code, in defining the methods of procedure in probate proceedings, provides: "The mode of proceeding is in the nature of that in a suit in equity, as distinguished from an action at law." And section 406 provides: "The court, or judge thereof, may enforce an order or decree in a suit *other than for the payment of money* by punishing the party refusing or neglecting to comply therewith as for a contempt." These two sections, taken together, limit the power of both the circuit and county courts, where a decree is for the payment of money, to an execution for its enforcement, and render subdivision 5, § 650, inapplicable in such case.

The decree of the circuit court must be affirmed.

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ACCOUNT.

It is the duty of every executor or administrator, within six months after notice of his appointment, and every six months thereafter until the estate is settled, to file a semi-annual account; and the county court must, at the first term after any such account is filed, ascertain and determine if the estate be sufficient to satisfy the claims presented and allowed within the first six months, or any succeeding six months thereafter, after paying the funeral charges and expenses of administration, and, if so, it shall so order and direct; but, if the estate be insufficient for that purpose, it shall ascertain what per centum it is sufficient to satisfy, and direct accordingly. By paying claims in advance of an order by the court, an executor or administrator takes the risk of securing the approval of his acts by the court when his accounts and vouchers shall be presented. If the final account of an executor or administrator be disapproved by the court, he may either appeal from the decree disallowing the same, or file another account, which shall meet the objections of the court. A decree for the payment of money in probate proceedings cannot be enforced as for a contempt. The proper process is an execution. *Rostel* v. *Morat*, 627

ACTION.

By heir against executor,

See EXECUTOR.

ADEMPTION.

1. Specific bequests to testator's daughters of certain sums of money, *held*, not to be adeemed by gifts of the same amount to their husbands, nothing being said by testator at the time as to the gifts being in lieu of the legacies. *Hart* v. *Johnson*, 29.
2. Legacies of a certain sum of money bequeathed in a will reciting that they are to be considered as the disposition of the homestead farm among the testator's children and are not to affect any other interest or estate, are neither specific nor demonstrative, but general, and, as such, capable of being adeemed by gifts of the same amount for which testator takes receipts showing that the payments are in consideration of the legatee's interest in the farm under the will. *Roquet* v. *Eldridge*, 91.
3. Money paid to a married woman in ademption of a legacy produces the same legal result as if she were unmarried. *Id.*

ADMINISTRATOR.

See ACCOUNT.

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ADVANCEMENT.

The presumption arising from the fact that testator specifically devised certain land to his two sons, and then directed the balance of his estate, "not hereinbefore particularly disposed of," to be disposed of as the law directs, is that he thereby intended to equalize the two sons with his other children, to whom he had made previous gifts, and that he did not intend the devise to them should operate by way of an advancement, within the meaning of Code Va. § 2561, which provides that advancements to a descendant, made by one who dies wholly or partially intestate, shall be brought into hotch-pot with the whole estate before the person advanced shall be entitled to partition or distribution with the other heirs of decedent. *Biedler* v. *Biedler*, 267

ALIENS.

Under Laws N. Y. 1875, c. 38, providing that aliens may inherit from a citizen who has "purchased and taken conveyance" to real estate, an alien may inherit land that the owner acquired by devise, for title by devise is title by "purchase," within the meaning of the statute. Affirming 40 Hun, 35. *Stamm* v. *Bostwick*, 501

ALIENATION.

Condition in restraint of,

See LIFE ESTATE, 2.

ALTERATION.

See REVOCATION, 2, 3, 4.

AMBIGUITY.

See CONDITIONAL DEVISE, 3.

ANCILLARY PROBATE.

1. A will should be admitted to probate in the jurisdiction of the testator's last domicile; but in admitting a will to probate the court must be presumed *prima facie* to base its adjudication respecting the last domicile upon sufficient evidence, and, under such circumstances, the probate and record thereof can only be questioned by some appellate or direct proceeding. The general rule is that letters testamentary or of administration have no extraterritorial force. When such letters have been duly granted in the jurisdiction of deceased's last domicile, they are the principal letters of authority, and those granted in other jurisdictions are ancillary. *Corrigan* v. *Jones*, 582

2. A will admitted to probate in the court of another state having jurisdiction of such matters is, on the presentation of the duly certified record thereof, entitled to be admitted to probate and record in this state, and letters testamentary or of administration may issue thereon as in other cases. The probate and record, under such circumstances, would seem to be mandatory; but the court is invested with discretion in the matter of issuing letters, but the discretion is not arbitrary. It must be sound and reasonable,—such as will secure the administration of the

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ANCILLARY PROBATE—*Continued.*
estate according to the will of the deceased, as well as with due regard to local creditors. *Id.*

ANNUITY.
1. Where a testator gives annuities to his widow and niece as general legacies, each being a simple bequest,—an absolute gift of a definite quantity,—there is a presumption of intended equality, unless the will contains unequivocal evidence of an intention to give a preference. *Additon* v. *Smith,* 274
2. This rule applied to a case where the annuity given to the widow was in addition to her dower, and that to the niece by a codicil exhibiting a thoughtful solicitude for her condition; the testator providing that, by the payment of the taxes, insurance, and repairs of his homestead, "None of the gifts or bequests or rights to my said wife, and to my said niece, shall be impaired or diminished;" and finally providing that "it shall be the duty of my said executors to so dispose of and invest my estate that there shall be, from year to year, a sufficient income to meet all said legacies and bequests." *Id.*

APPOINTMENT.
See LIFE ESTATE, 2.

ASSIGNMENT.
The grantee of a contingent remainderman whose estate depended upon the life tenant dying intestate acquires no right to contest the life tenant's will. *McDonald* v. *White,* 7

ASSUMPSIT.
See QUANTUM MERUIT.

ATTESTATION.
See NUNCUPATIVE WILL, 5, 6; WILL, 1, 2, 3, 6, 7, 8.

ATTORNEY AND CLIENT.
An attorney who sells real estate for his client, and represents the title to be good, which representation is relied upon, cannot thereafter assert title in himself to any real estate so sold. *Little* v. *Giles,* 312

BEQUEST.
1. Words in the same clause qualifying an absolute bequest are not to be rejected under the rule that an absolute estate is not to be cut down by a subsequent gift inconsistent therewith. *Bullard* v. *Chandler,* 191
2. A bequest to a married woman in the event of her becoming a widow or otherwise becoming "lawfully separated" from her husband, being at the most only an inducement to the wife to assert her legal right to a divorce, cannot be said to be against public policy. *Born* v. *Horstman,* 200
3. A trustee has a right to ask for the instructions of the court only in regard to present contingencies. *Bullard* v. *Chandler,* 191
4. A bequest invested with the character of a public charity does not become a private trust because of certain persons of the

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BEQUEST—*Continued.*

class to be aided being specified, nor because of the testatrix employing the words "strictly for private charities." *Id.*

See ADEMPTION; CHARITABLE BEQUEST; CHARITABLE USES; CONDITIONAL DEVISE OR BEQUEST; CONSTRUCTION, 2, 3, 4, 5, 6, 8, 11, 12, 16, 17. EVIDENCE, 2; LIFE ESTATE, 3, 4, 5, 6, 8; RESIDUARY BEQUEST OR DEVISE; TRUST, 1.

BILL FOR CONSTRUCTION.

See CONSTRUCTION, 13; BEQUEST, 3.

BURDEN OF PROOF.

See PROBATE, 1, 2.

CANCELLATION.

See REVOCATION, 2, 3, 4.

CESTUI QUE TRUST.

When a trustee is barred by the statute of limitations, the *cestui que trust* is also barred. (*Note*) 89

CHARITABLE BEQUEST.

1. A bequest as follows:—"I direct said Wilson (the executor) to divide said remainder among such charitable institutions in the city of St. Louis, Mo., as he shall deem worthy,"—is sufficiently definite, and will be carried into effect. *Howes* v. *Wilson*, 367
2. Mill. and V. Code Tenn. §§ 2006, 2007, which provides for the acquisition and holding of land for the purposes of public worship, by religious denominations, whether incorporated or not, do not empower an unincorporated local religious association to take a bequest of personal property. Mill. and V. Code Tenn. § 2008, which provides for the conveyance by the proper church officers of land held for the purpose of public worship does not enlarge the capacity of an unincorporated, local, religious association to take personal property under a will probated before the section was enacted. *Rhodes* v. *Rhodes*, 468
3. A bequest of a $1,000 bond to a designated church, "the interest to be applied to the church annually, or as fast as due," is a direct bequest to the church, and not to the executor, as trustee, to hold the bond, and pay over the interest. The bequest, being to an unincorporated local religious association, and failing to define how the interest should be applied, would be void for indefiniteness, even though the executor had been expressly appointed trustee, and, therefore, it cannot be saved by the appointment of a trustee by a court of equity. *Id.*

See BEQUEST, 4; CHARITABLE USES.

CHARITABLE USES.

1. A bequest to a trustee "to be disposed of by him for such charitable purposes as he shall think proper," creates a general charitable trust which a court of equity will not allow to fail by reason of the trustee's death without having exercised his discretion. *Minot* v. *Baker*, 43

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CHARITABLE USES—*Continued.*

2. A testator deposited a certain sum with a trustee to pay the annual interests to a beneficiary, unless it was added to the principal sum, and after the death of the beneficiary, to pay the amount of the principal sum to the testator, his executors or administrators. The beneficiary was allowed, by the terms of the deposit, to have the interest added to the principal in order to increase it, and this was done for several years, and until the death of the beneficiary. The testator in his will gave the residue of his estate to charitable purposes. *Held*, upon the death of the beneficiary after the death of the testator, that the amount deposited as above, together with the additions of interest, went to form the residue of the testator's estate, and was to be devoted to charitable purposes. *Id.*
3. A testator bequeathed one-fourth of the income of the residue of his estate "to the trustees of the Physio-Medical College of Cincinnati, Ohio," intending the bequest for a medical school which never was incorporated and which had ceased to exist. *Held*, that the income could not be claimed by a different body called the Physio-Medical Institute, and that the trust could not be administered *cy pres*, the college intended by testator not being a public or charitable institution. *Stratton* v. *Physio-Medical College.* 55
4. A bequest in remainder "to any responsible corporation in this city, existing at the time of the death" of the precedent legatee, "whose permanent fund is established by its charter for the purpose of ameliorating the condition of the Jews in Jerusalem, Palestine, * * * by promoting among them education, arts, and sciences, and by learning them mechanical and agricultural vocations," does not pass to a corporation whose object, as shown by its charter, is to contribute "to the relief of the indigent Jews in Jerusalem, Palestine," of which testator, a lawyer, was an incorporator and president at the time of executing the will, and which the will does not mention, though there is no other corporation in existence, at the time mentioned, which can take the legacy. *Riker* v. *Leo*, 530

See BEQUEST, 4; CHARITABLE BEQUESTS.

CHARITIES.

See CHARITABLE BEQUESTS; CHARITABLE USES.

CHILD OR CHILDREN.

"Without legal heirs" construed to mean "child or children." *Underwood* v. *Robbins*, 52

CODICIL.

1. A repugnant codicil cannot be proven after the expiration of the time within which the validity of a will can be contested. *Watson* v. *Turner*, 15
2. A codicil is a "will" within the meaning of the Alabama statute (Ala. Code of 1886, § 2,000), relating to the contest of wills. *Id.*
3. Where a will gives all the residue to the testator's two sons and

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CODICIL—*Continued.*

a codicil in language equally clear and decisive gives the same subject matter to all of his children share and share alike, the codicil must prevail. *Sturgis* v. *Work*, 23

4. Where a tract of land is devised in specified proportions to two devisees and the share given to one is diminished by codicil, the part so taken away will not go in augmentation of the part given to the other. *Id.*

See TESTAMENTARY CAPACITY, 1.

COMITY OF NATIONS.

See TRUSTEE, 2.

COMMUNITY PROPERTY.

See CONSTRUCTION, 17.

CONDITIONAL DEVISE OR BEQUEST.

1. A condition annexed to a devise or bequest, avoiding it if the beneficiary marry into the "family" of a person named, in the absence of anything in the context to the contrary, means one of the children of such person. *Phillips* v. *Ferguson*, 460
2. Such a condition, avoiding all the provisions of the will in favor of any of testator's children who should so marry, is valid, without any limitation of the property over in case of the contingency happening, and defeats devises and bequests of both real and personalty to the daughter who married in violation thereof. *Id.*
3. Parol evidence is admissible to show that a person of the name mentioned lived in the vicinity, and that testator was unfriendly with him and had shortly before making his will refused his consent to his daughter's marriage with said person's son, who afterwards married her during testator's life without his consent. *Id.*
4. Though a provision that the executors shall expend a given sum in land, to be divided among all his children, ordinarily would be a conversion of the amount into realty, yet the share of the daughter lapsed by her breach of said condition is unconverted, and goes to the residuary legatee. *Id.*

See BEQUEST, 2; REMAINDER.

CONSTITUTIONAL LAW.

See TAXATION.

CONSTRUCTION.

1. The term "legal heirs" will be construed to mean "child or children," when it clearly appears from the will that the testator used it in that sense. *Underwood* v. *Robbins*, 52
2. Except in residuary clauses, general words, such as "goods and chattels," when following after and coupled with words of a limited signification, such as "my household furniture," are restricted in meaning to things *ejusdem generis*, and would not include promissory notes nor money, unless partial intestacy would result from such construction by reason of the will con-

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CONSTRUCTION—*Continued.*
taining no bequest of the residue of testator's estate. *Peaslee* v. *Fletcher's Estate,* 217

3. A gift-over to the "heirs at law" of the first legatee, is to be construed with respect to personal property, not according to the law of the legatee's residence, but by the law of the testator's domicile, as it may have been changed by statute at the time of the legatee's death. *Lincoln* v. *Perry,* 289

4. A will directed: "All the rest of my estate I give and bequeath to R,.....the legal heirs of B., and of T., M. S., M. C., E., and C., and S., share and share alike, to them, their heirs and assigns, forever. Should either of my above named children die, leaving no legal heirs born of their own body, then I give their shares, after their death, to my then living heirs." B. died before the testator's death. *Held,* that the words "of T.," were used by clerical mistake, instead of "to T.," the words "Should either of my above-mentioned children die leaving no legal heirs born of their own body," and the words following, "I give their shares after their death," clearly importing that T. was not excepted from the provisions of the will. *In re Swinburne,* 355

5. The words, "die, leaving no legal heirs born of their own body," are not to be construed, "die, before the testator, leaving no legal heirs born of their own body;" the words following, "I give their share after their death," indicating that the testator contemplated a period before their death during which they might enjoy their share, and intended, by the words "after their death" that the bequest over should take place immediately after their death. *Id.*

6. The intention of the testator to have the two children of his deceased son B. take *per stirpes* is manifested by his use of the words, "legal heirs of B." in designating them; and this construction being in harmony with the entire structure of the bequest, should take effect, notwithstanding the use of the expression "share and share alike." *Id.*

7. A will in the following words: "I give and bequeath to my wife, Jeannie H. Eldridge, all my real and personal estate, consisting of clothing, jewelry, money, and all the instruments, desks, office appurtenances, and other property of like nature now belonging to me, and purchased prior to May 1, 1884, and now in the office of the firm of Sites & Harrison,"—held to pass title to all the testator's real estate. *Sites* v. *Eldredge,* 373

8. A bequest by a testator of "all the personal property which I may have at my death" covers the proceeds of real estate subsequently disposed of by testator. *Simmons* v. *Beazel,* 408

9. A testator left part of his estate in trust for the use of his wife for life, and after her death, or, if she died before him, upon his decease, directed it to be converted into money, and divided equally among his four children. In case of the death of any of his children, his or her share should be paid to his

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CONSTRUCTION—*Continued.*

or her issue, or, if there were no issue, then to the surviving children equally among them, or their issue, if deceased. *Held*, that the devises vested in right in the children of the testator at his death, subject to the life-estate of his widow. *Johnes* v. *Beers*, 435

10. Testator left the residue of his estate in trust for his four children, to be converted into money, and divided equally among them, and on the death of either or any of them, "before he or she shall have received his or her share," such share to go to his or her issue, or, if there was no issue, then to the surviving children, or their issue, if deceased. Three years after the death of the testator one of the children died, and devised all his estate to his widow. *Held*, that the widow took the whole of his share of the estate in exclusion of his issue, as the words "shall have received" are to be taken as meaning "shall have become entitled to receive by surviving me," and the devisee "receives" the moment the testator dies, although the enjoyment may be postponed to a future time. *Id.*
11. A will provided that whereas N., brother of testatrix, is "indebted individually to the estate of my husband, S., deceased, I direct that such individual indebtedness be paid for him out of my estate," etc. N., while doing business for his brother, had borrowed the money for use therein, and signed his brother's name to the notes by himself as agent. There was no other indebtedness to the estate of the husband by N., and testatrix always regarded and spoke of this as his debt. *Held* to be her intention to direct the payment of this debt. *Scott* v. *Neeves*, 510
12. It was proper to show by parol and other extraneous evidence that this was the debt referred to by testatrix, and that she always regarded and spoke of it as the debt of her brother N. *Id.*
13. In a suit by the executor of the wife against the two brothers to obtain a construction of the will, it was proper to assess against her estate the taxable costs and reasonable attorneys' fees of all parties. *Id.*
14. Courts, sometimes, in construing wills, read "or" as meaning "and," and "and" as meaning "or," but such departures from the words of the will are never made, except it is plain that it is necessary to do so in order to give effect to what appears to be the clear intention of the testator. All doubts are to be resolved in favor of the testator's having said exactly what he meant. *Cody* v. *Bunn*, 526
15. In construing an instrument to determine whether it is a will or deed, the intention is to control as collected from the whole instrument. Where an instrument conveys a present title to the grantee, and the grantor reserves out of the estate conveyed the right to the use and possession during his life, the instrument is a deed, and not a will. Such an instrument does not create an estate in freehold to commence *in futuro*, and is not within

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CONSTRUCTION—*Continued.*
the technical rule of the common law applied in such cases. *Beebe* v. *McKenzie*, 538

16. A testator bequeathed all his personal estate, after the payment of his debts and funeral expenses, to his wife, and at her death "said personal estate, or so much as shall be unconsumed, to be equally divided between" his heirs, naming them. The wife survived the testator and accepted the provision made for her in the will. The executor paid the debts and funeral expenses, and delivered the balance of the personal estate to the widow, and settled his accounts accordingly. The will did not require or direct the executor to collect or distribute the personal estate that might be left unconsumed at the death of the widow, or enjoin upon him any duty with respect thereto. *Held*, (1) after the debts and funeral expenses were paid, the widow became entitled to the possession, use and enjoyment of the personal estate, with the right to consume the whole or any part of it; and it was the duty of the executor to deliver possession thereof to her. (2) When the executor performed that duty, he administered the estate and executed his trust, and cannot be held responsible for any use or disposition made by the widow of such personal estate after it so lawfully came to her possession; nor can he thereafter be required to account therefor in the Probate Court. *Posegate* v. *South*, 544

17. Life insurance policies were taken out by a husband payable to his wife, her administrators, executors, or assigns, and in the event of her death before him, then to their children. *Held:* that the title thereto did not pass to the husband under her will bequeathing to him all her "personal property" in certain houses, nor by a bequest of all her interest in the community property; and that the words "their children" in the policies embraced only children common to them both. *Evans* v. *Opperman*, 550

18. Testator gave his wife a life-estate in all his property. After some other provisions he gave the residue to his daughter, H., her heirs and assigns. In case she should die without child or children, his estate was to go to his brothers and sisters. The income of a sum of money was to be set apart after the death of the wife, for a son of testator; and, in case he should die without issue, or leaving issue who should not reach the age of 21 years, the principal was to go absolutely to H. *Held*, that the words "die without child or children," in the residuary devise to H. meant her death without issue during the life of her mother, the taker of the life-estate; and, having survived her mother, her estate was absolute. *McCormick* v. *McElligott*, 565

CONSTRUCTION.
See ADVANCEMENT; ANNUITY BEQUEST, 1, 4; CHARITABLE BEQUEST, 1, 3; CHARITABLE USES, 2; CODICIL, 3, 4: CON-

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CONSTRUCTION—*Continued.*
TINGENT REMAINDER; DEVISE, EVIDENCE, 2; INSURANCE POLICY; LIFE ESTATE; PRECATORY WORDS; REMAINDER; RESIDUARY LEGATEE; RULE IN SHELLEY'S CASE; STATUTORY CONSTRUCTION; TRUST, 1, 4; WORDS AND PHRASES.

CONTEST OF WILL.

See ASSIGNMENT; CODICIL, 1, 2; PROBATE, 2.

CONTINGENT REMAINDER.

Under a devise of land to testator's daughter for life, "and, after the death of either of them, their share to be eqally divided amongst their children or their descendants," the heirs of a child of one of the daughters, which died during its mother's life, take no estate since the remainder does not vest until the death of the daughter. *Bates* v. *Gillett*, 423

See REMAINDER 2.

CONTRACT.

A contract made in a will under which immediate possession of land is to be given to the devisee on condition that he take testatrix to live with him, and support her as one of his own family, cannot be rescinded after possession has been given and expenditure made on the faith of it for slight annoyances suffered by testatrix in devisee's family. *Tuit* v. *Smith*, 498

See REVOCATION, 1.

COSTS.

On bill for construction of will.

See CONSTRUCTION, 13

CREDITORS.

See DEVISE, 1.

CY PRES.

See CHARITABLE USES, 3.

DECREE.

See PARTITION.

DEED.

See CONSTRUCTION, 15; REVOCATION, 1; TRUST, 4.

DELUSIONS.

See TESTAMENTARY CAPACITY, 10, 14.

DEMONSTRATIVE LEGACY.

A demonstrative legacy has a prior right to payment out of the fund charged, but is payable, at all events, out of the principal of the estate, if the fund proves inadequate. *Additon* v. *Smith*, 274

See ADEMPTION.

DESTRUCTION OF WILL.

See PROBATE, 2, 3, 4.

DEVASTAVIT.

See EXECUTOR, 3.

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DEVISE.

1. To confer such an interest in property as cannot be reached by creditors of the devisee, the language of the testator must be such as to clearly import an intention so to do. *Maynard* v. *Cleaves*, 210
2. A devise of real estate to testatrix's husband in general terms without words of limitation with a gift over to his children of "whatever of the same should be left at his decease," confers an absolute estate upon the first devisee; and the gift over is void for repugnance. *Halliday* v. *Stickler*, 212
3. A devise by implication may arise from a gift to testator's brother of the balance of the rents and profits of certain property after payment of an annuity to testator's widow so long as she remains unmarried, there being no other gift of the premises in formal language. *Masterson* v. *Townshend*, 308
4. At common law, a devise of real estate, in order to convey the fee, must contain words of inheritance or perpetuity; but under the statutes of this state such words are not necessary to convey the fee, and every devise of land is to be construed to convey all of the estate of the devisor therein, unless it shall clearly appear by the will that the devisor intended to convey a less estate. *Little* v. *Giles*, 312
5. When a testator devises all his estate, real and personal, giving his devisee the power of unqualified disposition of the property devised, the devisee may convey the legal title thereto; and a limitation over in a subsequent clause of the will, in favor of other persons, of "all of the estate herein bequeathed, or whatever may remain" at the marriage of the first taker, will not affect the titles previously conveyed. *Id.*

DEVISEE.

See CONSTRUCTION, 1, 7, 9, 10, 15; DEVISEE; EXECUTORY DEVISE; LAPSED DEVISE; LIFE ESTATE, 1, 2, 6, 7; PROBATE, 5, 6; RULE IN SHELLEY'S CASE; TITLE BY DEVISE.

A devisee, being a mere volunteer, has no equity to reform a description of property never owned by testator to render it applicable to property which he did own. *Sturgis* v. *Work*, 23

See CODICIL, 4.

DISTRIBUTION OF LEGACIES.

Where a definite surplus remains in the hands of the trustee under a will in excess of the amount of certain unpaid legacies, after payment of the balance of the specific legacies and all debts and other charges against the estate, the distribution of such surplus among the residuary legatees will not be delayed because a trust, connected with such unpaid legacies, is not yet performed. *Thyng* v. *Moses*, 262

DISTRIBUTIONS, STATUTE OF.

See STATUTORY CONSTRUCTION.

DIVIDENDS.

See LIFE ESTATE, 5, 8.

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DOWER.

See ELECTION, 1, 4, 5.

EJECTMENT.

In ejectment, where defendant claims under the provision of a will of a living person that he shall have immediate possession of the property on condition that he will take testatrix to live with him, and support her as one of his own family, evidence is admissible to show that he took possession under the will, and still retains possession, that testatrix lived with him for a long time, and that defendant performed all his part of the contract; as in that case he could not be deprived of possession, though such contract is contained in a testamentary paper. *Smith* v. *Tuit*, 473

ELECTION.

1. Under the Indiana Statute (Ind. Rev. Stat. 1881, sec. 2505 as amended by Laws of 1885, ch. 103) providing that a widow's election against the will be in writing signed and acknowledged by her within one year after probate of the will, actual possession of one-third of the land, in ignorance of the requirement, is not sufficient; and if she die within the year without having exercised her power to elect, the right cannot be exercised by her heirs. *Fosher* v. *Guilliams*, 96
2. A testatrix, who had been the owner of one entire city lot, conveyed by deed one-quarter thereof to one of her sons. Afterwards, by will, she devised the entire lot, including that portion thereof previously conveyed by her to her three sons, including the grantee in the deed referred to, share and share alike. Upon the probate of the will, *held*, that such grantee was required to elect whether he would relinquish his own property and take under the will; and that, if he elected to retain his own property and against the will, he was not entitled to a partition of the remaining three-fourths of the lot, but equity will appropriate the gift made by the will to him, to compensate the other beneficiaries under it. *Brown* v. *Brown* 132
3. In order to raise a case for an election by a beneficiary under a will on the ground that the testator assumes thereby to dispose of property which he had previously given to the same beneficiary by another instrument, it must very clearly and satisfactorily appear that the testator has intentionally assumed to dispose of the property of the beneficiary, who is required on that account to give up his own gift; and this intention must appear from the words of the will itself, and cannot be proved by evidence *dehors* the instrument. *Sherman* v. *Lewis*, 233
4. Where a widow for more than one year after her husband's death, fails to make her election between a testamentary provision and dower, equity cannot relieve her from the statutory presumption that she has elected to take under the will (Rev. St. N. Y. 7th Ed. p. 2198, § 14), because she acted in ignorance of the nature and extent of the estate, and relied upon the

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ELECTION—*Continued.*

representations of testator's confidential agent and adviser, who was familiar with the estate, but who was also the husband and agent of testator's daughter, out of whose lands plaintiff would be dowable. The act is a statute of limitations, and the policy of the law forbids the granting of relief against its provisions. *Akin* v. *Kellogg.* 570

5. Under such circumstances, representations by testator's agent and adviser of matters of opinion, probability, possibility or conjecture, even if made in the presence of his wife, cannot operate as an estoppel to prevent her from pleading the statutory presumption of election against plaintiff's claim. *Id.*

EQUITABLE CONVERSION.

1. If the direction of a will as to the proceeds of the sale of land require land to be sold, the direction is equivalent to a positive command to sell, and the land will for the purposes of the will, be deemed to be personalty. Money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted. Where a testator orders his land to be sold, the conversion will, unless a contrary intention distinctly appears, be deemed to have been directed merely for the purposes of the will; and consequently, if any of those purposes fail, so that the money does not pass under the will, it will in equity be considered land, and be given to the heir. Land, in its devolution by descent, always follows blood. *Roy* v. *Monroe,* 413

2. Testator, by his will, declared that, after the satisfaction of certain devises and bequests, "I desire the remainder of my estate to be equally divided between my children," naming them. "I desire that my excutor will dispose of all my real estate as soon as it can be done without loss to my estate." *Held,* that the will did not operate by its own force to convert the land into money, so as to place it beyond the lien of a judgment recovered against one of the children before the sale by the executor, which lien, by Rev. St. Mo. 1879, §§ 2354, 2730, 2731, 2767, attaches to any interest of the debtor in land, whether legal or equitable. *Eneburg* v. *Carter,* 481

3. A will devising and bequeathing all the testatrix's estate, real and personal, to executors, with power of sale, for the purpose of distributing the proceeds as directed. produces an equitable conversion of the real estate into personalty. *Greenland* v. *Waddell,* 590

EQUITABLE CONVERSION.

See CONDITIONAL DEVISE OR BEQUEST, 4.

EQUITABLE MORTGAGE.

A *cestui que trust* for life executed a mortgage in fee on the trust-estate, and, after her death, the remainderman in fee executed, under seal, an unattested paper covenanting for suffi-

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EQUITABLE MORTGAGE—*Continued.*

cient consideration that the mortgage should continue to be a lien on the land. Afterwards, he sold and conveyed to another, who paid a sum in cash, and contracted to assume certain mortgages, and pay certain debts of the vendor to third persons, equal in amount to the remainder of the purchase price. The cash payment and part of these debts were made before the purchaser had actual notice of the agreement to continue the mortgage lien. *Held*, that, since the purchaser's agreements were made before notice, and remained in full force after notice, there was no equitable lien against the property in favor of the mortgage for the purchase money unpaid at the time of such notice. *Watkins* v. *Reynolds*, 442

EQUITY.

Bill to reform will.

See DEVISEE.

ERASURE.

See REVOCATION, 2, 3, 4.

EVIDENCE.

1. Where it is sought to impeach the statements of a witness by proof of his admissions contained in a deposition or other writing signed by him, the proper foundation should be laid therefor as in other cases, by first directing his attention to the particular matters in question, and giving him an opportunity to explain. *Hammond* v. *Dike*, 146
2. Evidence of the situation of the parties may be received when it is necessary to a correct understanding of a bequest, together with the facts and circumstances which may reasonably be supposed to have influenced the testator in making the will, in order that the court may ascertain his motives and intention. *Little* v. *Giles*, 312

See CONDITIONAL DEVISE OR BEQUEST, 3; CONSTRUCTION, 12; EJECTMENT; ELECTION, 3; PROBATE, 4; TESTAMENTARY CAPACITY, 1, 15, 17; UNDUE INFLUENCE; WILL, 1, 4, 8.

EXECUTION OF WILL.

See HOLOGRAPHIC WILL; PROBATE, 5, 6; WILL, 1, 6, 7, 8.

EXECUTOR.

1. An heir cannot maintain an action to compel the executor named in the will to qualify or to renounce the appointment; and such a person not having qualified, is accountable for property of the decedent in his possession not to the heir but to the personal representative. *Cable* v. *Cable*, 21
2. Where the executor of a deceased partner, in compliance with directions in the testator's will, continues the partnership business with the surviving partner, with the testator's assets, and for the benefit of the estate, he does not thereby become personally liable for debts contracted by the firm during the life of the deceased partner; nor does the fact of his so continu-

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EXECUTOR—*Continued.*
ing the business give the surviving partner any implied authority to bind him for such debts. *Mattison* v. *Farnham*, 214
3. If there be reasonable ground for considering that the legal steps to be taken to collect assets by the executor would have been ineffectual, then his failure, acting in good faith, to take them does not render him liable as for a *devastavit*. *Gifford* v. *O'Connor*, 225
4. A delay in presenting a claim against the estate of a decedent of more than a year and a half after the probate of a will, and for six months after the expiration of an advertisement for claims against the estate, wholly unexplained, bars the creditor from holding the executor liable for moneys paid out by him in good faith in accordance with the provisions of the will, although for a superstitious use. *Id.*
See ACCOUNT; CONSTRUCTION, 16; POWERS, 3; TRUSTEE, 5.

EXECUTORY DEVISE.
1. A fee determinable upon death of devisee without heirs of his body, with a devise over to his surviving brothers or brother, may be sustained as an executory devise; and the gift over is not too remote when made to the survivors of a class of which the first devisee is a member. *Summers* v. *Smith*. 118
2. A gift over to another if the first devisee die without issue, being construed to import an indefinite failure of issue, is void, and the first devisee is vested with the fee. *Hackney* v. *Tracy*, 343

FAILURE OF ISSUE.
See EXECUTORY DEVISE, 2.

FOREIGN WILL.
See ANCILLARY PROBATE; PROBATE, 5, 6.

FREEHOLD IN FUTURO.
See CONSTRUCTION, 15.

HEIR.
Action by, against executor.
EXECUTOR, 1.

"HEIRS-AT-LAW."
See CONSTRUCTION, 3; INSURANCE POLICY.

HOLOGRAPHIC WILL.
1. The olographic, like every other testament, is a solemn act depending for its validity upon compliance with the forms prescribed by law; and, however clearly it appears that the decedent intended the instrument to be her will, if it is not clothed with the forms prescribed it cannot stand. *Succession of Armant*, 361
2. An olographic testamentary writing containing the caption, "Testament d'Aglae Armant," but without signature at the end or following the testamentary dispositions, does not import such

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HOLOGRAPHIC WILL—*Continued.*

a signature as is required under the historical and rational interpretation of article 1588 of our Code. *Id.*

3. Article 1588 was copied into our Code from article 970 of the French Code, which in turn had been taken from an ordinance of Louis XV. prescribing the forms of the olographic testament. Prior and subsequent to the Code Napoleon, the jurisprudence of France has been uniform to the effect that the signature must be at the end of the testament, or, at least, that no dispositions following the signature can have effect. *Id.*
4. This jurisprudence was extant and well-known when the framers of our Code adopted our article. It must be presumed that they intended it to receive the same interpretation, which moreover, correspond to the common understanding and to the standard definition of the meaning of the word "*signature.*" *Id.*
5. A contrary interpretation of a like provision in the English statute of Frauds, by certain English and American courts, was so much criticised by sound legists that the statute was amended so as expressly to require the signature to be at the bottom of the testament.

We are moreover satisfied, in this case, that the name, as written in the caption, was not intended to be a signature, but that her belief that the instrument was her will was simply based on her ignorance that a signature was necessary.

The other ground assumed in support of the instrument as a will is inconsistent with the foregoing, and is, besides, unsupported by proof. *Id.*

INCOME.

See LIFE ESTATE, 4, 5, 7, 8.

INFANT.

See PARTITION.

INNOCENT PURCHASER.

See EQUITABLE MORTGAGE.

INSANE DELUSIONS.

See TESTAMENTARY CAPACITY, 9-15.

INSTRUCTIONS, BILL FOR.

See BEQUEST, 3.

INSURANCE POLICY.

1. Where a statute authorizes the insurance of an applicant for his own benefit, the proceeds of the policy going to his personal representatives for the benefit of his estate, and testator in his application stated that the insurance was for the benefit of "myself," the proceeds of the policy must be administered as a part of his estate under his will; notwithstanding the form of the policy by which the company agrees to pay "to the executors or administrators of said member in trust, however, for, and to be forthwith paid over to his heirs-at-law." *Harding* v. *Littlehale,* 39

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INSURANCE POLICY—*Continued.*

2. A policy of insurance payable to "the devisees or heirs-at-law" of the insured, is payable to his widow and not to his next of kin, upon his dying intestate leaving no children—she being the sole heir of his personal property under Rev. St. Ill. c. 39, Sec. 1; and the fact that she was the beneficiary directly named in other policies of insurance on her husband's life does not change the rule of construction. *Alexander* v. *Northwestern Masonic Aid Association,* 163

See CONSTRUCTION, 17; RESIDUARY BEQUEST OR DEVISE.

INTERLINEATION.

See REVOCATION, 2, 3, 4.

INTOXICATION.

See TESTAMENTARY CAPACITY, 6.

JUDGMENT LIEN.

See EQUITABLE CONVERSION, 2.

KIN.

See NEXT OF KIN.

LACHES.

A lapse of nearly 20 years in asserting title to an interest in land, during which time the claimant has, as the guardian of his sons, treated the land as belonging wholly to them, bars his right, in equity, to assert his claim.

Notice that a person claims an interest, as heir in land which has been devised to another on the ground that the will is invalid, is no notice that such person also claims an interest in the land under such will. *Bates* v. *Gillett,* 423

LAPSED DEVISE.

Under Rev. St. Ohio, § 5971, providing that where a devise "is made to any child or other relative of the testator, if such child or other relative * * * shall die thereafter, leaving issue surviving the testator, * * * such issue shall take the estate devised in the same manner as the devisee would have done, if he had survived the testator," where a devise is made to I. "for the term of his natural life, afterwards to his children in fee-simple," and I. dies, and two of his children also die leaving issue in the lifetime of testator, the issue of the deceased children of I. take the share that their parents would have taken, had they survived the testator. Owens, C. J., and Williams, J., dissenting. *Woolley* v. *Paxson,* 602

LEGACY.

See ADEMPTION; ANNUITY; BEQUEST; DEMONSTRATIVE LEGACY; NEXT OF KIN.

LEX DOMICILII.

See CONSTRUCTION, 3.

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LEX REI SITAE.

See PROBATE, 5, 6.

LIFE ESTATE.

1. A testator directed as follows: "I devise and bequeath to my wife, so long as she remains my widow, the net use and control of all the real estate and personal property of which I may die seized, for the support of herself and my children. Should she marry, from and after such marriage she shall have and control only one-third in value of the real estate, and one-third of the personal property then remaining, absolute. Should she survive all my children, they having died without issue, I devise and bequeath all my real estate and personal property to be hers, her heirs and assigns, forever. But in case of the death of my wife, leaving any of my children surviving, I devise and bequeath to them all of my estate in equal proportions, share and share alike; the heirs of any of my children taking their deceased parent's share." The widow married again. *Held* (a) that her interest in the third of testator's land was only a life-estate. (b) That the devise to the children vested at testator's death and that the share of one of them who died unmarried before the widow's marriage passed to its heirs. *Siddons* v. *Cockrell*, 31
2. A devise of property to testator's daughter, "to be kept and retained by her as long as she shall live, and be disposed of as to her seems proper at her decease," being a life estate with absolute power of appointment of the fee, confers on the devisee such an interest as enables her to convey the fee by deed in her lifetime; for if testator intended to prohibit an alienation during her life, the provision is void, there being no devise over. *Todd* v. *Sawyer*, 64
3. A bequest of the "use and improvements" of an estate during the natural lives of the legatees is not rendered absolute by a discretion to use a portion of the principal should it be necessary for their personal comfort, "saving as much as possible for the children born to them"; and by implication the children of the legatees take a vested interest in the remainder under the will. *Peckham* v. *Lego*. 66
4. A will creating a trust for the benefit of the husband, son and grandchildren of the testatrix, the trustee to pay the husband from time to time, upon his written request, so much of the income and principal as he "may require for his own personal use," construed, *ex visceribus testamenti*, as intending that so long as the husband is able to support himself by his own exertions, or has property available for his support, the trustee shall not pay him any portion of the income or principal of the fund. *Hull* v. *Holloway*, 75
5. Where certain shares of capital stock in a business corporation were bequeathed in trust to pay over the "dividends of said stock" to another during her life, remainder to the trustee absolutely, and thereafter the corporation increased its capital stock

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LIFE ESTATE—*Continued.*

to represent profits actually invested in extending and perfecting its plant, and distributed the new shares *pro rata* among the holders of the old, the new shares represented capital, and not income or "dividends," and therefore the trustee was entitled, as against the life-tenant, to hold the new shares received by her, subject to the same trust as the old, and with the same right of remainder. *Gibbons* v. *Mahon*, 392

6. A testator bequeathed his personal property to his wife forever, and devised to her and his two daughters, in common, all his realty, to be occupied and disposed of by them as they should think proper. By a codicil added eight years afterwards, and expressly declared to be a part of the will, he directed that all that might remain of the property of his wife, both real and personal, at her decease, should go to B. His wife died before testator. *Held*, that testator intended to give his wife a life-estate only, with remainder to B. on her death. Affirming, 39 Hun., 121. *Crozier* v. *Bray*, 485

7. A devise of property in trust to pay the income to testator's daughter, "for her sole and separate use, upon her separate receipt, without the control or interference of any husband she may have or take, for and during all the term of her natural life," creates a trust for life, and not for coverture, though the daughter, being only five years old, is not married nor contemplating marriage. *Kuntzleman's Estate*, 505

8. Testator left his residuary estate to trustees to pay the net income therefrom to his daughter during her life, and, after her death, the principal to a charitable association. Part of the estate consisted of shares in a land company, held by testator. The company was unincorporated, but was organized by a contract entered into by its members, which provided that its business should be to buy and sell land, and should be carried on by trustees in their own names; that the interest of each member should be measured by his shares of stock, which he could sell and transfer without consulting with his associates, and without impairing the power of the trustees, or the existence of the company; that the stockholders should select the trustees to manage the business, and should be entitled to a distributive share in the profits. After testator's death, the trustees sold part of the land belonging to the company, and declared a dividend of the profits thereon. The increased price of the land was due to the discovery of copper on adjacent lands after testator's death. *Held*, that the dividend was personal estate representing income, and that having accrued after testator's death it went to his daughter. *Appeal of Merchant's Fund Association* 576

LIFE INSURANCE.

See INSURANCE POLICY.

LIMITATION OVER.

See DEVISE, 2, 5; POWERS, 2; REMAINDER, 1.

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LIMITATIONS, STATUTE OF.
See ELECTION, 1, 4, 5; NOTE AT P. 89.

LOST WILL.
See PROBATE, 2.

MURDER.
See STATUTORY CONSTRUCTION.

MUTUAL WILLS.
See NOTE (*Johnes* v. *Beers*) AT P. 441.

NEXT OF KIN.
A gift over to next of kin and to certain other legatees after termination of a particular estate, *held* to refer to those who should be next of kin at the termination of the particular estate. *Fargo* v. *Miller*. 1
Revocation of Probate, 20
Signing by mark, 38
The Rule in Shelley's Case, 63
Statute of limitations—When trustee is barred, the *cestui que trust* also is barred, 89
Effect of change in the law respecting the execution of wills, 107
Gift over after an absolute devise, 137
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Work of description, general and specific, 223
Statute of distribution—When husband is heir of the wife, 293
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Will of realty—Personalty—Execution and Probate—Foreign wills, and Comity 354
Charitable devises and bequests—Uncertainty, 372
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Insane delusions—Belief in spiritualism—Witchcraft, 460
Devise—Judgment lien, 484
Testamentary capacity—When the testator is aged, or infirm, or partially or entirely blind—Absent-mindedness or feeble-mindedness, 563
Nuncupative wills, 589

NOTICE.
See EQUITABLE MORTGAGE LACHES.

NUNCUPATIVE WILL.
1. A will executed in the country, and purporting to be a nuncupative testament under private signature in the presence of three witnesses only, one of whom did not understand the language in which the testator expressed himself, and the will was drawn up, is invalid.
A nuncupative will under private signature, executed before two competent witnesses only, is invalid. *Succession of Dauterive* 181
2. The law disqualifies as witness to a testament a person who is

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NUNCUPATIVE WILL—*Continued.*

deaf. A witness who does not understand the language in which the will is dictated and written down is intellectually deaf, and, practically, is as though he had not attended at all. *Id.*

3. The circumstance that, while it was being dictated, what was then said had been translated to that witness, does not supply the want of knowledge of the latter. *Id.*

4. On proceedings to establish an alleged nuncupative will, made by deceased three days before his death, whereby he gave nearly all his property to his widow, to the exclusion of his children, it is proper to charge the jury that the nuncupative will must be strictly proved in all essential points; that it must be made as a matter of necessity, and not as a matter of choice; that it must appear that the deceased was *in extremis* when he made the will; and that the jury should find against the nuncupative will if they believed from the evidence that deceased had plenty of time and opportunity to execute a formal written will. *Scaife* v. *Emmons*, 587

5. Where a verbal will is reduced to writing and subscribed by two witnesses one of whom is a legatee thereunder, and the other is his wife, the husband is not a competent, disinterested witness, within the meaning of section 5991 of the Revised Statutes, and the will is invalid. *Vrooman* v. *Powers*, 611

6. The two witnesses to a verbal will must be competent, disinterested witnesses at the time of their attestation, and their disqualification as witnesses by reason of interest under the will, cannot be removed by a renunciation of such interest at the time the will is admitted to probate, or at the trial of an issue to contest the validity of the will. Section 5925 of the Revised Statutes, as to the effect of a witness being a devisee or legatee under the will, is not applicable to verbal wills. *Id.*

OLOGRAPHIC WILL.

See HOLOGRAPHIC WILL.

PAROL EVIDENCE.

See CONDITIONAL DEVISE OR BEQUEST, 3; CONSTRUCTION 12.

PARTITION.

An infant party defendant to a suit in partition is, in the absence of fraud, as much bound by the decree made therein as an adult. *Sites* v. *Eldredge*, 373

PARTNERSHIP.

See EXECUTOR, 2.

PERPETUITIES.

See POWERS, 2.

POWER TO MAKE A WILL.

See TESTAMENTARY CAPACITY.

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POWERS.

1. A power of sale annexed to a devise of the fee, to be exercised at the discretion of the devisee, and without designating any particular object for which it should be exercised, expires at the death of the devisee. *Sites* v. *Eldredge*, 373

2. The will devised and bequeathed testatrix's estate to executors, with power of sale for the purpose of distributing the proceeds, one-third each to testatrix's brother and sister, and the income of the other third to another sister, A., while she remained the wife of her then husband. If she survived him she was to take the *corpus* of the fund, and if she did not, it was to go to her lawful issue, if she left any surviving her, who reached the age of 21 years; otherwise it should go to testatrix's brother and the other sister. When testatrix died A. had no children living. *Held*, that the direction to pay the fund to A's children in the event mentioned, or, on their failure to arrive at the age of majority, to testatrix's brother and sister, was void under 1 Rev. St. N. Y., p. 773, § 1, forbidding the suspension of the ownership of personal property for more than two lives in being at the death of testatrix. *Greenland* v. *Waddell*, 590

3. The power of sale given by the will to the executors is not within the statutory term of express trusts, to execute which the supreme court has power to appoint trustees under 1 Rev. St. N. Y., p. 730, §§ 69, 70. The power of sale being vested in executors, such power would be taken by an administrator with the will annexed, and, on the acceptance by the supreme court of the resignation of the surviving executor, the power of sale could not be executed by a trustee appointed by the supreme court. *Id.*

4. Upon the resignation of the surviving executor, the supreme court appointed A. as trustee, to whom testatrix's brother and other sister conveyed and transferred their contingent interest in the property. *Held*, that, as testatrix would die intestate as to such fund in case A. did not survive her husband, or in case the power of sale was not exercised by sale of the land during her life, the intestacy would be applicable to it as real estate, and the land or personalty would go to testatrix's next of kin, the brother and sister. The issue of A., if she should leave any surviving her, would have no interest in the fund or property, and, if she did not survive her husband, her interest would be only a life-estate. The brother and sister having conveyed their interest to A., she acquired the entire beneficial interest in the property, making the exercise of the power of sale unnecessary. *Id.*

POWERS.

See LIFE ESTATE, 2; TRUST, 1; TRUSTEE, 5.

PRECATORY WORDS.

1. Where there is an absolute or unlimited devise or bequest, subsequent precatory expressions as to the disposition of the prop-

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PRECATORY WORDS—*Continued.*

erty after the death of the devisee or legatee, will not defeat the devise or bequest, nor limit the estate therein to the right of use and possession during life. *Bills* v. *Bills*, 134

2. When there is an absolute power of disposal with the confidence expressed that the donee will dispose of the property according to the testator's wishes, none being expressed, there is no trust. *Giles* v. *Anslow*, 174

PRESENTATION OF CLAIM.

See EXECUTOR, 4.

PRESUMPTION.

See PROBATE, 3.

PROBATE.

1. Under the statutes of Minnesota, (sections 15-17, Gen. St. 1878), the burden of establishing the sanity of a testator is upon him who offers the will for probate.

This view of the statute does not necessarily change the common practice, whereby the proponent first makes out a *paifere mia* case, the contestant then introducing evidence of insanity, leaving to proponent the privilege of again submitting testimony as to the testator's soundness of mind *In re Layman's Will*, 127

2. Where the probate court has found and established the contents of a lost, spoliated or destroyed will, in a future proceeding to contest the validity of such will, the order of probate will be *prima facie* evidence of the due attestation, execution, validity, and contents of the will, and the burden of proof will be on the contestants to invalidate such will. *Behrens* v *Behrens*, 300

3. When a will, once known to exist, and to have been in the custody of the testator, cannot be found after his decease, the legal presumption is that it was destroyed by the testator with the intention of revoking it. *Id.*

4. To strengthen such presumption, it is competent to prove the declarations of the testator after making his will, that he had destroyed, or intended to destroy, the same. *Id.*

5. The statute of New Jersey (Rev. of N. J., Supp. 775) providing for the probate of foreign wills does not abrogate the rule that devises of realty must be executed according to the law of the state wherein the land lies; but merely renders a transcript of the foreign probate competent evidence, dispensing with proof by the subscribing witnesses. *Nelson* v. *Potter*, 347

6. The courts of one state being without jurisdiction over title to lands in another state, the clause of the federal constitution requiring full faith and credit to be given in each state to the records and judicial proceedings of every other state, does not apply to foreign devises of realty. Id.

PROBATE.

See ANCILLARY PROBATE, CODICIL, WILL, 8.

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PUBLIC POLICY.

See BEQUEST, 2; TRUST, 2.

QUANTUM MERUIT.

S. worked for P., who was his uncle, without any express agreement for compensation, but with the mutual understanding of both that he should be compensated by adequate provisions in the will of M. The latter died without making such provision. *Held*, that S. might recover the value of such services as upon a *quantum meruit*. *Schwab* v. *Pierro*, 206

REFORMATION.

Bill to reform will.

See DEVISE.

RELIGIOUS SOCIETY.

See CHARITABLE BEQUEST, 2, 3.

REMAINDER.

1. A devise to testator's son for life upon condition that he occupy the estate, with a limitation over in fee to his "lawful heirs" upon his death or refusal to occupy, creates a vested remainder in the children of the life-tenant, who immediately become entitled to possession upon their father selling and delivering possession to a stranger. *Conger* v. *Lowe*, 139

2. The law favors the early vesting of estates, and the courts will generally adopt the earlier of two possible periods. But the testator may defer that period and make the vesting of the estate depend upon a contingency; and when he has done so with reasonable certainty his wishes will prevail provided he does not transcend the time allowed by the rules of law. *Larmour* v. *Rich*, 156

See CONTINGENT REMAINDER; LIFE ESTATE, 1, 3, 5, 6; RULE IN SHELLEY'S CASE; TRUST, 1.

REMOTENESS.

See EXECUTORY DEVISE.

REPUGNANCY.

See DEVISE, 2.

RESCISSION.

See CONTRACT.

RESIDUARY BEQUEST OR DEVISE.

See DEVISE, 2.

A general bequest of "all other property of which I shall die seized," passes the benefit of a life insurance policy payable "to the devisees, or, if no will, to the heirs." *Aveling* v. *North-Western Masonic Aid Association*. 12

See CODICIL, 3; RESIDUARY LEGATEE.

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RESIDUARY LEGATEE.

A residuary legatee, as a general rule, is entitled to all legacies not effectually disposed of by the will; but, to be thus entitled, he must be the general legatee of the testator's whole residuary estate. Where the testator has confined his gift of residue to a particular part of his estate, and excluded another part will not pass under the gift of residue. *Roy* v. *Monroe*, 413

See CONDITIONAL DEVISE OR BEQUEST 4.

RESTRAINT OF ALIENATION.

See LIFE ESTATE, 2.

RETROSPECTIVE LEGISLATION.

See WILL, 2.

REVOCATION.

1. It may be laid down as a general rule that a written instrument which discloses the intention of the maker respecting the posthumous destination of his property, and which is not to operate until after his death, is testamentary in its character, and not a deed or contract, and may be revoked. *Hazleton* v. *Reed*, 268

2. A testatrix erased the word "fourteenth" in her will, and interlined the word "twelfth," so as to increase smaller devises to larger ones; but the erasure did not render the word illegible. *Held*, that such action was an attempt to make a new disposition of the property, which was inoperative under Gen. Laws N. H. c. 193, § 6, requiring all changes which in any way affect a will to be attested and subscribed, in the testator's presence, by three or more credible witnesses; and, there being no apparent intention to revoke except by way of the attempted alteration, and the word erased not having been obliterated, the word "fourteenth" remained as a part of the will. *Gardner* v. *Gardiner*, 283

3. In such case, the word "fourteenth" not having been obliterated, there was no revocation within the meaning of Gen. Laws N. H. c. 193, § 14, which provides that "no will or clause thereof shall be revoked unless by some other valid will or codicil, or by some writing executed in the same manner, or by canceling, tearing, obliterating, or otherwise destroying the same." *Id.*

4. The clause containing the erasure and interlineation originally mentioned nine devisees, but the names of two of them were canceled by drawing a light pencil mark through them. In the succeeding clause, disposing of the remaining five-fourteenths, the word, "fourteenth" remained unchanged, and the will contained no residuary clause. *Held*, that the cancelation was conditional, and made with a view to the attempted change of disposition, which, having failed, the legacies remained. See contract. *Id.*

RIGHTS OF CREDITORS.

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RULE IN SHELLEY'S CASE.

1. When a devise is to heirs generally, no particular person or class of persons being designated as remainder-men, the rule in Shelley's Case applies and is held to conclusively express the intention of the testator, notwithstanding the expression of an intention that the ancestors shall take a less estate than the fee. *Hageman* v. *Hageman*, 60
2. The rule in Shelley's Case is a rule of property and not one of construction. It prevails over the manifest intention of the testator; and is applicable alike to leasehold and to freehold property. *Hughes* v. *Nicklas*, 123
3. Testator devised property in trust to pay the income to testator's daughter for life, and after her decease "in trust to and for the only proper use, benefit, and behoof of such person or persons as would be entitled to the same" by the laws of the state, "if my said daughter had survived her mother and husband, * * * and died intestate, seized and possessed of the said premises, and for such estate and estates as such person or persons would in such case be entitled to by the laws aforesaid." *Held*, that, because of the exclusion of the husband and mother, the rule in Shelley's Case did not apply, and the devise created a valid trust in favor of those entitled in remainder, and it was immaterial that the husband and mother died before the daughter. *Kuntzleman's Estate*, 505

SHELLEY'S CASE, RULE IN.
See RULE IN SHELLEY'S CASE.

SIGNATURE.
See HOLOGRAPHIC WILL; WILL, 1, 6, 8.

SPIRITUALISM.
See TESTAMENTARY CAPACITY.

STATUTE OF DISTRIBUTIONS.
See STATUTORY CONSTRUCTION.

STATUTE OF LIMITATIONS.
See LIMITATIONS, STATUTE OF.

STATUTORY CONSTRUCTION.
A legatee and heir who murders the testator in order to prevent the revocation of the will, shall not be suffered to reap the benefit of his crime either under the will nor under the statute of distributions. *Riggs* v. *Palmer*, 329

SUBSCRIBING WITNESS.
See NUNCUPATIVE WILL, 5, 6; WILL, 1, 2, 3, 5, 7, 8.

SUPERSTITIOUS USES.
See EXECUTOR, 4.

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TAXATION.

Laws Wis. 1889, c. 176, requiring the payment of a percentage on all estates of decedents of more than $3,000 in counties of over 150,000 inhabitants to the county treasurer, for the use of the county, as a condition precedent to their settlement in probate proceedings levies a tax, and is void under Const. Wis., art. 4, §§ 31, 32, providing that taxes must be assessed and collected by laws "uniform in their operation throughout the state," and "not by special or private laws." Taylor, J., dissenting. Such tax cannot be upheld as a tax on "civil suits," under Const. Wis., art. 7, § 18, providing that "the legislature shall impose a tax on all civil suits * * * which shall constitute a fund to be applied towards the payment of the salary of judges," since the tax must be paid to the county treasurer, for the use of the county. The settlement of estates in the probate court is not a "civil suit" within the meaning of the constitution. *State* v. *Mann*, 616

TESTAMENTARY CAPACITY.

1. Upon an issue of testamentary capacity, where the testator, who had previously been of sound disposing mind and memory, was suddenly prostrated with severe and fatal illness, during which he executed a codicil to his will, it is competent for the proponent to prove that a short time before he was taken sick the testator had expressed his intention to make such changes in his will as he did make by his codicil.

It is proper in such a case, to show the consistency of the will with the natural inclinations and previously declared intentions of the testator. *Hammond* v. *Dike*, 146

2. In determining the question of undue influence upon the mind of a testator in disposing of his property by will, the frame of the will and the nature of the testamentary dispositions are in themselves important evidence. *Mitchell* v. *Mitchell*, 170

3. To constitute undue influence, the testator must be so controlled by persuasion, pressure, or fraudulent contrivance that he is not left to act intelligently and voluntarily, but becomes subject to the will or purposes of others. *Id.*

4. A testator may be affected by his prejudices and predilections arising from his associations and external influences, but if he is of sufficient testamentary capacity, he may nevertheless dispose of his property as he pleases by will, if it be his own voluntary act.

Evidence held sufficient to support the findings of the trial court. *Id.*

5. The test of testamentary capacity is that the testator can comprehend the property that he is about to dispose of, the objects of his bounty, the meaning of the business in which he is engaged, the relation of each of these factors to the

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TESTAMENTARY CAPACITY--*Continued.*

others, and the distribution that is made by the will. *Bannister* v. *Jackson*, 236

6. The effect of present intoxication and mental disease, induced by habitual indulgence in intoxicants, must be measured by the test indicated; for both may exist in some degree without destroying testamentary capacity. *Id.*

7. A will may be contrary to the principles of justice and humanity —it may be both unnatural and unjust—yet if it appears to have been made by a person of sufficient age to be competent to make a will, and also appears to be the free expression of a sound mind, the courts must uphold it. *Middleditch* v. *Williams*, 447

8. Where want of testamentary capacity or undue influence is alleged, it is the duty of the court to examine the provisions of the will, to see whether or not they furnish any evidence of the truth of the charges made against the validity. Standing alone they are insufficient to support a judgment against the validity of the will, but in connection with other evidence may be entitled to considerable weight. *Id.*

9. If a testator possesses sufficient mental power to take into account all the considerations necessary to the making of a proper will, though he is subject to an insane delusion, yet if it appears that such delusion neither influenced him, nor was calculated to influence him, in making his will, his will must be upheld. *Id*

10. When a person conceives something extravagant to exist, which, however, has no existence, but is the creature of his imagination, and whenever, at the same time, having once so conceived, he is incapable of being permanently reasoned out of such conception, such person, it is safe to say, is subject to an insane delusion. *Id.*

11. It is only a conception or delusion which springs up spontaneously in the mind of a person, and is not the result of evidence of any kind, that can be said to furnish evidence that his mind is unsound. *Id.*

12. Where a person is induced by false evidence or by false statements to believe a fact to exist, which does not exist, or where, in consequence of his faith in evidence which is true, but which is wholly insufficient to prove the truth of what he believes, he believes a fact to exist which in reality has no existence, his belief may show want of discernment, or that he lacks ordinary power of discrimination, and is, consequently, easily duped, but not that his mind is unsound. *Id.*

13. Belief in spiritualism, that is, that there can be communication between the spirits of the dead and the living, is not an insane delusion. *Id.*

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TESTAMENTARY CAPACITY—*Continued.*

14. The term "delusion," as applied to insanity, does not mean a mere mistake of fact, or being induced by false evidence to believe that a fact exists which does not exist. *Id.*
15. The declarations of a testator are competent to show the condition of his mind, but not to prove undue influence by either persons or spirits. *Id.*
16. A person who is aged, infirm, and almost blind may make a valid will if capable of recollecting the property she is about to dispose of, understanding the manner of distributing as therein set forth, knowing the objects of her bounty, and the nature of the business in which she is engaged. *Waddington* v. *Busby,* 558
17. The facts that the draughtsman of the will is executor, and his wife and son are favored legatees, while they call for suspicious scrutiny, will not invalidate the will, without some more certain evidence appearing of fraud or undue influence. Each case must be adjudged by its own circumstances, and no general rule can be made applicable to all cases. *Id.*

TITLE BY DEVISE.

Title by devise is title by "purchase." *Stamm* v. *Bostwick,* 501

TRUST.

1. Under a will bequeathing testator's real and personal property in trust to executors for the purpose of disposing of it to the best of their judgment for the support and education of his two children, directing that the executors should pay none of the children's debts unless first authorized by them, and should cut off supplies if there were any extravagance, and making a gift over to others of the estate remaining, if the chidren should die without issue; it was held that the executors took the legal title in fee; that a conveyance of the property by the only acting executor was valid. *Chase* v. *Cartwright,* 83
2. There is no rule of public policy in Massachusetts forbidding the accumulation of a fund in the hands of an active trustee beyond the majority of the *cestui que trust.* *Claflin* v. *Claflin,* 151
3. Where land is devised in trust to pay the income to A. for life, and to convey the fee to the right heirs of A. on her death, no conveyance to the heirs is necessary since 3 Rev. St. N. Y., (7th ed.), p. 2183, Sec. 67, providing that "when the purposes for which an express trust shall have been created shall have ceased, the estate of the trustee shall cease also," of its own force vested the title in her heirs immediately upon her death. *Watkins* v. *Reynolds,* 442
4. An instrument by which certain personalty is transferred to one in trust, to pay the income and profits arising from it to the grantor during her life, and directing that money coming into the hands of the grantee by virtue of the trust shall be invested in real estate designated by the grantor, and that

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TRUST—*Continued.*

after her death the grantee shall distribute among her children all of said property, does not constitute a gift *inter vivos*, nor is it a testamentary disposition, but is a deed of trust operating *in praesenti*. *Forney* v. *Remey*, 476

TRUST.

See BEQUEST, 3, 4; CHARITABLE BEQUEST, 3; CHARITABLE USES; LIFE ESTATE, 4, 7; PRECATORY WORDS; TRUSTEE.

TRUSTEE.

1. Although there be no words of gift to the trustee, he takes the legal title to the trust estate, such title being necessary for the purposes of the trust. *Toronto General Trust Co.* v. *Chicago etc., R. Co.* 294
2. Where the courts of New York will not, for reasons of public policy, aid foreign executors or administrators in removing assets from this state, to the prejudice of domestic creditors, a foreign trustee, having the legal title to the assets, may, by the comity of nations, maintain an action here in respect thereof, when he does nothing to the prejudice of domestic creditors. *Id.*
3. Code Civil Proc. N. Y., § 2818, provides that when a sole testamentary trustee dies, becomes a lunatic, is removed, or resigns, and the trust has not been fully executed, the Surrogate's Court may appoint a successor, unless such appointment would contravene the express terms of the will. *Held*, that, notwithstanding the use of the word "sole," the provision applies to a case where there are several trustees, and all resign. *Royce* v. *Adams*, 542
4. Upon the death of a trustee, under 1 Rev. St. N. Y., pp. 730, 731, §§ 71, 72, the trust devolves upon the supreme court, and it has jurisdiction to appoint trustees, with full power to execute the trust. *Id.*
5. Where a power of sale is conferred by the will upon the executors, or "whoever shall execute this will," it is not a personal trust, and may be executed by trustees lawfully appointed to succeed the executors, who have resigned. *Id.*

TRUSTEE.

See DISTRIBUTION OF LEGACIES; POWERS, 3, 4.

UNCERTAINTY.

See WILL, 5.

UNDUE INFLUENCE.

The fact that a person who had made two wills, dividing his property between his wife and his sister, within a few days after making the second, and after several days of very severe illness of which he died in a few hours, made another will revoking those made before, and leaving all his property to his wife, (no reason being apparent for the change in the dis-

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UNDUE INFLUENCE—*Continuod.*
position of his property), is not, in the absence of any other evidence of undue influence, sufficient to require the issue of undue influence on the part of the wife to be submitted to the jury. *Nelson's Will,* 183

VERBAL WILL.
See NUNCUPATIVE WILL.

VESTED REMAINDER.
See REMAINDER.

WILL.
1. A statutory provision (Ark. Code Civ. Proc. 6344) providing that a signature to a will shall be deemed to "include mark when the person cannot write, his name being written near it and witnessed by the person who writes his name as a witness," does not preclude other proof of the attestation where the person writing the witness' name fails to sign his own name; nor is signature by mark permitted solely upon the ground of illiteracy. *Davis* v. *Semmes,* 36
2. The formal attestation of wills is governed by the statute in force at the time of execution and not by the statute existing at the time of the testator's death. *Appeal of Lane,* 99
3. A will may be attested by witnesses "in the presence" of the testatrix, although it be physically impossible for her to see the witnesses in the act of signing. *Cook* v. *Winchester,* 109
4. Upon the trial of an appeal from an order admitting a will to probate, an attorney-at-law, who had been the legal adviser of the testator, was permitted to disclose communications made to him by the deceased in his lifetime upon business matters, and the advice and counsel given thereon. The object of the testimony was to lay a foundation for the admission in evidence of the opinion of said attorney as to the sanity of the testator, and there was nothing in the testimony which in any manner reflected upon the character or reputation of the deceased. *Held,* that the contestant, who was one of the heirs-at-law of the deceased, could not be permitted to exclude such testimony by invoking the rule of privileged communications. *In re Layman's Will,* 127
5. A direction to executors to purchase at a price left blank in the will, a tract of land at or near the residence of the devisees for their use as a cattle pasture, without any other sort of designation by which any particular piece or quantity of land could be determined, is void for uncertainty. *In re Traylor's Estate,* 223
6. Under the statute of Oregon, every will, in order to be effective, is required to be in writing, signed by the testator, or by some other person, under his direction, in his presence, and attested by two or more competent witnesses, subscribing their names to the will in the presence of the testator.

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WILL—*Continued.*

The acknowledgment, however, cannot be inferred from mere silence. Lord, J., dissenting. *Luper* v. *Werts*, 243

7. To prove the execution of the will, it must be shown that the witnesses who subscribed their names to it did so at the request of the testator; that they saw him sign it, heard him acknowledge it, or observed acts which unmistakably indicated that he had signed it.

And, in order to admit the will to probate, it must be proven to have been so signed and attested, and that the testator, in the case of the disposal of goods and chattels, was over the age of 18 years, and, in the case of the disposal of real property, was of 21 years of age and upwards, and was of sound mind. *Id.*

8. The proof of a will should not fail because the testimony of the subscribing witnesses thereto is insufficient to establish its execution, provided it can be proven by other competent evidence or by circumstances clearly indicating its execution; but, where such proof is not made, courts have no more authority to adjudge the will effective than they would have to attempt to enforce an oral expression of a party regarding the disposition which should be made of his property at his death. *Id.*

9. A testator can disinherit his heirs and next of kin only by leaving his property to others. Mere words of exclusion in an instrument making no disposition of the estate will not suffice to disinherit. *Coffman* v. *Coffman*, 380

WILL.

See ANCILLARY PROBATE; CODICIL; CONSTRUCTION, 15; CONTRACT; DEVISEE; HOLOGRAPHIC WILL; LIFE ESTATE; NUNCUPATIVE WILL; PRECATORY WORDS; PROBATE; REVOCATION; TESTAMENTARY CAPACITY, &C.

WIDOW.

See ELECTION, 1, 4, 5.

WITNESSES.

See NUNCUPATIVE WILL; WILL, 1, 2, 3, 6—8.

WORDS AND PHRASES.

"without legal heirs." *Underwood* v. *Robbins*, 52
"use and improvement." *Peckham* v. *Lego*, 66
"necessary for their personal comfort." *Id.* 66
"may require for his personal use." *Hull* v. *Holloway*, 75
"in the presence" of testator in statute. *Cook* v. *Winchester* 109
"heirs of body." *Summers* v. *Smith*, 118
"lawful heirs." *Conger* v. *Lowe*, 139
"devisees or heirs at law" in insurance policies. *Alexander* v. *Northwestern Masonic Aid Association*, 163
"to be for her comfort and support." *Maynard* v. *Cleaves*, 210

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WORDS AND PHRASES—*Continued.*
"heirs at law" in a gift over. *Lincoln* v. *Perry*, 289
"die without issue." *Hackney* v. *Tracy*, 343
"of" construed to mean "to." *In re Swinburne*, 355
"die, leaving no legal heirs born of their own body." *Id.* 355
"signature." Succession of amount, 361
"dividends." *Gibbons* v. *Mahon*, 392
"all the personal property which I may have at my death." *Simmons* v. *Beazel*, 408
"family." *Phillips* v. *Ferguson*, 460
"purchase." *Stamm* v. *Bostwick*, 501
"or" for "and," and "and" for "or." *Cody* v. *Bunn*, 526
"their children." *Evans* v. *Opperman*, 550
"die without child or children." *McCormick* v. *McElligott*, 565
"civil suits." *State* v. *Mann*, 616

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